

THE LAW OF HEARSAY IN NEBRASKA

RICHARD COLLIN MANGRUM†

I.	INTRODUCTION	501
II.	§ 27-801 THE CONCEPT OF HEARSAY	503
	§ 27-801(1): STATEMENT DEFINED	503
	§ 27-801(2): DECLARANT DEFINED	505
	§ 27-801(3): HEARSAY DEFINED	505
III.	§ 27-801(4): CATEGORIES OF NONHEARSAY BY DEFINITION:	
	§ 27-801(4)(a):PRETRIAL STATEMENTS OF IN-COURT DECLARANT	
	§ 27-801(4)(a)(i): INCONSISTENT STATEMENTS	513
	§ 27-801(4)(a)(ii): CONSISTENT STATEMENTS	516
	[§ 27-801(4)(a)(iii): PRETRIAL IDENTIFICATION]	519
	§ 27-801(4)(b): STATEMENT OFFERED AGAINST A PARTY	519
	§ 27-801(4)(b)(i): OWN STATEMENT	523
	§ 27-801(4)(b)(ii): ADOPTED STATEMENT	523
	§ 27-801(4)(b)(iii): AUTHORIZED STATEMENT	526
	§ 27-801(4)(b)(iv):STATEMENT WITHIN SCOPE OF AGENCY	526
	§ 27-801(4)(b)(v): COCONSPIRATOR'S STATEMENT	529
IV.	§ 27-802: HEARSAY INADMISSIBLE UNLESS OTHERWISE PROVIDED	533
V.	§ 27-803: HEARSAY EXCEPTIONS WHERE AVAILABILITY IMMATERIAL	534
	[§ 27-803(1): PRESENT SENSE IMPRESSION].....	534
	§ 27-803(1): SPONTANEOUS UTTERANCE	536
	§ 27-803(2): STATE OF MIND	541

† Professor of Law, Creighton University School of Law; B.A. 1972, Harvard University; J.D., 1975, University of Utah School of Law; B.C.L., 1978, Oxford University; S.J.D., 1983, Harvard University. The author acknowledges the research assistance of William Ince, Creighton University, Class of 1991. The author also expresses appreciation to the Faculty Research Fund of the Creighton University School of Law for financial assistance in completing this Article.

§ 27-803(3): STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT.....	545
§ 27-803(4): PAST RECOLLECTION RECORDED....	546
§ 27-803(5): BUSINESS RECORDS	548
§ 27-803(6): ABSENCE OF BUSINESS RECORD	553
§ 27-803(7): PUBLIC RECORDS.....	553
§ 27-803(8): VITAL STATISTICS	558
§ 27-803(9): ABSENCE OF PUBLIC RECORD	559
§ 27-803(10):RELIGIOUS RECORDS OF FAMILY HISTORY	559
§ 27-803(11):MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES	559
§ 27-803(12): FAMILY RECORDS	559
§ 27-803(13): RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.....	560
§ 27-803(14): STATEMENTS IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY.....	560
§ 27-803(15): STATEMENTS IN ANCIENT DOCUMENTS	561
§ 27-803(16): MARKET REPORTS, COMMERCIAL PUBLICATIONS	561
[§ 27-803(18): LEARNED TREATISES]	562
§ 27-803(17): REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY	563
§ 27-803(18): REPUTATION CONCERNING BOUNDARIES OR HISTORY	563
§ 27-803(19): REPUTATION AS TO CHARACTER...	563
§ 27-803(20): JUDGMENT OF PREVIOUS CONVICTION	564
§ 27-803(21): JUDGMENT AS TO PERSONAL, FAMILY OR GENERAL HISTORY, OR BOUNDARIES	564
§ 27-803(22): RESIDUAL EXCEPTION	564
VI. § 27-804: HEARSAY EXCEPTION WHERE UNAVAILABILITY OF DECLARANT REQUIRED	567
§ 27-804(1):UNAVAILABILITY OF DECLARANT DEFINED AS INCLUDING:	
§ 27-804(1)(a): EXEMPTED BY PRIVILEGE	567
§ 27-804(1)(b): REFUSES DESPITE COURT ORDER.....	567
§ 27-804(1)(c): LACK OF MEMORY	567
§ 27-804(1)(d): DEATH, ILLNESS OR INFIRMITY	567

§ 27-804(1)(e): UNABLE TO PROCURE BY PROCESS	567
§ 27-804(2): HEARSAY EXCEPTIONS:	
§ 27-804(2)(a): FORMER TESTIMONY.....	568
§ 27-804(2)(b): STATEMENT UNDER BELIEF OF IMPENDING DEATH	571
§ 27-804(2)(c): STATEMENT AGAINST INTEREST	572
§ 27-804(2)(d): STATEMENT OF PERSONAL OR FAMILY HISTORY	574
§ 27-804(2)(e): RESIDUAL EXCEPTION.....	574
VII. § 27-805: HEARSAY WITHIN HEARSAY	575
VIII. § 27-806: ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT	576

I. INTRODUCTION:

The hearsay rule of evidence furthers our adversarial method of evaluating the credibility of witnesses by cross-examination under oath in the presence of the trier of fact. The testimonial infirmities that can be scrutinized through an effective in-court cross-examination include: (1) perception, (2) memory, (3) ambiguity, and (4) sincerity. The Federal Advisory Committee's Introductory Note to the federal hearsay rule observes that in order to expose inaccuracies with respect to these testimonial infirmities "the Anglo-American tradition has evolved three conditions under which witnesses will ideally be required to testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination."¹ The Introductory Note to the federal hearsay rule explains that the hearsay rule is specifically designed to insure compliance with these conditions, especially the condition of cross-examination. However, because certain uncross-examined testimony is thought to have sufficient guarantees of trustworthiness, hearsay is defined so as not to exclude all out-of-court statements. Similarly, hearsay exceptions provide additional instances where out-of-court statements will be admissible because the testimonial infirmities are believed to be less at issue.

Even without the hearsay rule, the confrontation clause of the sixth amendment would compel the exclusion of out-of-court statements offered by the prosecution in criminal cases on lines parallel-

1. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE & PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE art. 8, at 119 (1973) (quoting Federal Advisory Committee, Introductory Note: The Hearsay Problem, 56 F.R.D. 183, 288 (1973)).

ling the hearsay rule. Indeed, the Supreme Court in recent cases has closely linked the confrontation clause to the hearsay rule and its common law exceptions. In *Ohio v. Roberts*,² the Court stated that certain firmly rooted hearsay statements, in this case the former testimony exception, have sufficient "indicia of reliability" to satisfy the confrontation clause. But in *Roberts* the prosecution established the unavailability of the declarant, a foundational prerequisite for the former testimony exception, leaving open the issue of whether unavailability must be established, for confrontation purposes, for all hearsay testimony. In *United States v. Inadi*,³ the Court held that the confrontation clause does not require an affirmative showing of unavailability for other hearsay statements which fall within well-established exceptions which have not required a showing of unavailability. Further, the Court in *Bourjaily v. United States*,⁴ held that if a statement falls within a firmly rooted hearsay exception, then the court need not, for confrontational purposes, make a separate finding of the reliability of the statement. In *Bourjaily*, the Court found the coconspirator nonhearsay category to be sufficiently rooted in the common law that no separate showing of reliability is necessary for confrontational purposes. Thus, if a hearsay statement passes either (1) an indicia of reliability test, or (2) a firmly rooted hearsay exception test, then there should be no confrontation clause issue.

This Article reviews the Nebraska law of hearsay and its exceptions. The format has been chosen with the Nebraska practitioner in mind. The Nebraska Rules of Evidence are patterned after the Federal Rules of Evidence, but there are differences and nuances worth noting. Accordingly, the outline for most sections of the hearsay rule discussed herein (1) begins with a statement of the rule, (2) followed by any legislative history distinguishing the Nebraska rule from its federal counterpart, (3) followed by a brief foundational outline of the subject rule, and (4) by an analysis of the rule as it has been interpreted by the courts. In the case of the minor hearsay exceptions where there is little or no authority and infrequent use, a complete outline has not been given. The rules are nonetheless referenced for sake of completeness. There are many excellent resources on the subject of hearsay generally and the Federal Rules of Evidence in particular. The intent here is not to duplicate these materials, but instead to focus more specifically on the Nebraska Rules and their interpretive history.

2. 448 U.S. 56 (1980).

3. 475 U.S. 387 (1986).

4. 483 U.S. 171 (1987).

II. SECTION 27-801(1-3): THE CONCEPT OF HEARSAY:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-801 provides:

(1) A statement is (a) oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion;

(2) A declarant is a person who makes a statement;

(3) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.⁵

B. LEGISLATIVE HISTORY:

Nebraska in 1975 adopted the definitional concept of hearsay contained in the Federal Rules of Evidence, Rule 801(1-3). The opinion of the Nebraska Supreme Court Committee on Practice and Procedure was that adoption of the definition of hearsay provided in the Federal Rule would "not change the law of Nebraska existing prior to the adoption of these rules."⁶

C. FOUNDATION:

The basic foundational elements of a hearsay statement include:

(1) a statement, (2) by an out-of-court declarant, (3) offered to prove the truth of the matter asserted.

D. INTERPRETIVE ANALYSIS:

(1) The evidence must constitute a "statement" as defined by § 27-801(1).

Section 27-801(1) defines statement to include "(a) an oral or written assertion or (b) nonverbal conduct of a person, if it is intended by him as an assertion."⁷ The definition of "statement" is important because it is part of the section 27-801(3) definition of hearsay. The significance of the definition contained therein is that neither verbal nor nonverbal conduct is hearsay unless intended as an assertion. This definition, following the Federal Rule 801(a), rejects the common-law rule announced in *Wright v. Tatham*.⁸

Tatham actually involved nonassertive inferences, or implied as-

5. NEB. REV. STAT. § 27-801 (Reissue 1989).

6. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE & PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 801, at 126 (1973) (hereinafter PROPOSED NEBRASKA RULES).

7. NEB. REV. STAT. § 27-801(1) (Reissue 1989).

8. 7 Eng. Rep. 559 (H.L. 1838), *aff'd* 112 Eng. Rep. 488 (Ex. ch. 1837).

sertions, more than non-assertive conduct. Basically, the case turned on silly Marsden's testamentary capacity. The devisee, Marsden's steward, offered in evidence certain letters, previously written to Marsden, received from persons who had subsequently died. The various letters were offered as circumstantial evidence of Marsden's sanity. The relevancy link was that the writers wrote Marsden for advice, implying that they thought he was sane, implying that he was sane. The letters addressed the sanity issue only impliedly. The House of Lords upheld the exclusion of the letters as inadmissible hearsay. Baron Parke in the Exchequer Chamber provided several examples of nonassertive conduct which are within the hearsay rule: (1) if a wager had been made, evidence of the payoff could not be introduced to prove the outcome of the bet, (2) the conduct of family relations in their absence could not be introduced as evidence that a member of the family is a lunatic, (3) the election of a person to a high office could not be introduced as evidence of capacity, (4) the fact that a physician permitted a sick person to execute a will could not be introduced to prove his testamentary capacity, (5) evidence that a captain examined his ship before embarking with his family on a voyage could not be introduced as evidence of the seaworthiness of the ship.

Under the statutory definition of hearsay each of Baron Parke's examples of nonverbal hearsay would not fall within the hearsay rule unless the court finds that the conduct was intended to be assertive. That is, the court would have to find that the conduct was undertaken for the purpose of asserting the relevant fact: (1) that a bet had been lost, (2) that a family member was a lunatic, (3) that the person elected was competent, (4) that the person executing the will had capacity, (5) the ship was seaworthy. If the conduct is not expressly assertive, but instead only impliedly reflects the belief of the actor regarding some fact in question, then the evidence would not fall within the hearsay rule. In such cases the evidence would be admissible as circumstantial evidence of the fact in question.

The Federal Advisory Committee Note, quoted as part of the legislative history of the Nebraska rule, observes that "[t]he rule is so worded as to place the burden upon the party claiming that the [assertive] intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility."⁹ As applied to the letters in *Wright*, because the writers presumably wrote the letters to Marsden for the purpose of obtaining advice, rather than for the purpose of asserting to the world that Marsden had the capacity to

9. PROPOSED NEBRASKA RULES at 124 (quoting the Federal Advisory Committee Note, 56 F.R.D. 183, 294 (1973)).

give advice, the advice-asking propensities of Marsden's friends would not qualify as "statements" within the meaning of section 27-801(1).

(2) The out-of-court declarant must be a "person" as defined by section 27-801(2).

Section 27-801(2) makes it clear that, for hearsay purposes, the out-of-court declarant must be a person. Accordingly, hearsay does not apply to clocks telling the time, dogs barking discovery or awareness,¹⁰ radars registering speed,¹¹ or stop signs telling the driver to "Stop."

(3) The statement must be offered to prove the truth of the matter asserted as provided by section 27-801(3):

a. Overview:

The heart of the hearsay rule is the inability to cross-examine the declarant to test the testimonial infirmities of (1) sincerity, (2) ambiguity, (3) perception, and (4) memory. The perceived importance of cross-examination in testing these testimonial infirmities argues in favor of a declarant-oriented definition of hearsay; the importance of contemporaneous cross-examination favors an assertion-oriented definition. Congress compromised the definitional debate between declarant-oriented and assertion-oriented theories by adopting an assertion-oriented definition of hearsay, while retaining nonhearsay categorization, under limited circumstances, for specific declarant-oriented statements, including certain (1) prior inconsistent statements, (2) prior consistent statements, and (3) pretrial identification testimony. Admissions were also defined as nonhearsay as a matter of adversarial justice. Nebraska adopted the basic definition of hearsay found in the Federal Rule, but modified or eliminated some non-hearsay-by-statutory-definition categories.

The courts still do not always understand the difference between a declarant-oriented and an assertion-oriented definition of hearsay. The Supreme Court of Nebraska's analysis of the hearsay rule in *State v. Lenz*¹² illustrates the confusion. The defendant had been charged with robbery and using a firearm to commit a felony. The court upheld, over an hearsay objection, the admission of testimony of a police officer that the store employees had told him that a

10. See *Buck v. State*, 77 Okla. Crim. 17, 138 P.2d 115 (Okla. 1943) (holding that evidence could be presented that two blood hounds named "Old Boston" and "Diana" tracked the defendant arsonist from the scene of the crime).

11. See *City of Webster Groves v. Quick*, 323 S.W.2d 386 (Mo. 1959) (holding that an officer testifying as to the readings from a speed timer did not constitute hearsay).

12. 227 Neb. 692, 419 N.W.2d 670 (1988).

weapon had been used in the robbery. The court reasoned that because the employees referred to in the police officer's testimony had actually testified at trial that weapons had been used in the robbery, the police officer's testimony to the same effect was not hearsay. The court incorrectly assumed that because the witnesses were subject to cross-examination regarding their in-court testimony, there was no hearsay problem with allowing their out-of-court testimony to the same effect. Conversely, the court characterized as hearsay the police officer's testimony about an out-of-court statement regarding the weapon that had been used by another witness who did not testify at trial.¹³ The distinction made between these statements, each of which were out-of-court statements offered to prove that a firearm had been involved in the robbery, does not fit the assertion-oriented definition of hearsay applicable in Nebraska because the statements in each instance were offered to prove the truth of the matter asserted.

Understanding when a statement has evidentiary value for purposes other than its truth content is one of the most hotly debated and confusing issues in evidence. To understand when a statement is not offered to prove its truth, illustrative categories are useful. There are some categories of nonhearsay statements which are not controversial; in other instances certain categories are a matter of evidentiary debate.

b. Consensus Categories of Statements not Offered to Prove the Truth of the Statement Made:

(i) Words of legal significance, or verbal acts:

Certain verbal acts, such as the words of a contract, words establishing agency, slanderous words, etc., have legal significance because they have been spoken. If offered to prove that they have been stated they are nonhearsay. A classic case illustrating this proposition is *Hanson v. Johnson*,¹⁴ where one of the partners indicated his intended division of farm interests by telling the other that he could have the corn in specific cribs. There the court held that the statements had legal significance and were, therefore, nonhearsay. Other courts have followed the same categorization of verbal acts. For example, in *NLRB v. H. Koch & Sons*,¹⁵ the court approved the introduction of testimony that a union had accepted an offer concerning severance pay as words of legal significance apart from their truth content. Similarly, the court in *Ries Biologicals, Inc. v. Bank of*

13. *Id.* at 697, 419 N.W.2d at 673-74.

14. 161 Minn. 229, 201 N.W. 322 (1924).

15. 578 F.2d 1287 (9th Cir. 1978).

Santa Fe,¹⁶ permitted testimony on the oral agreement of the Bank to guarantee payment of medical supply orders made by a vendee, on the reasoning that the guarantee constituted words of legal significance.

The Supreme Court of Nebraska recognized the "words of legal significance" nonhearsay category in *State v. McSwain*.¹⁷ *McSwain* involved a conspiracy to obtain money by false pretenses. The statement at issue was a call to the bank by a person of unknown origin who misrepresented their identity for purposes of getting the bank to release money to be picked up by a delivery man. The court rejected the hearsay objection on appeal, reasoning that "the calls were an inherent part of the plan to obtain money by false pretenses."¹⁸ The court added that the purpose of introducing a verbal act is to prove that the act occurred, rather than to prove the truth of the statement which constitutes the act.

Of course, a statement has to be of legal significance before the verbal-act nonhearsay category applies. For example, the court in *State v. Jones*¹⁹ ruled that an affidavit from an attorney who purportedly gave the defendant legal advice that an investment scheme did not violate state securities laws did not fit the verbal-act nonhearsay category because no specific intent to violate the securities laws was necessary to sustain a conviction.

(ii) Words accompanying verbal acts:

Certain statements, such as "take the car son and be back by 11:00 P.M.," are verbal parts of an act establishing authority to drive the parent's car. Similarly, the statement "take this money as a gift" explains the legal significance of a transfer. In each such instance the fact that the words are accompanied by the act has legal significance; therefore, the words are nonhearsay if offered to prove that they were spoken.

The Supreme Court of Nebraska confused the categories of verbal acts and words constituting a verbal part of an act in *Alliance National Bank & Trust Co. v. State Surety Co.*²⁰ *Alliance* involved an action on a bond indemnifying against false and fraudulent representations of a motor vehicle dealer. To prove the dealer's misrepresentations to the bank, the bank offered the dealer's statements made to the bank loan officer. The statements, in effect, constituted the act

16. 780 F.2d 888 (10th Cir. 1986).

17. 194 Neb. 31, 229 N.W.2d 562 (1975).

18. *Id.* at 35, 229 N.W.2d at 564.

19. 235 Neb. 1, 453 N.W.2d 447 (1990).

20. 223 Neb. 403, 390 N.W.2d 487 (1986).

of misrepresentation, and were, therefore, verbal acts. However, on the issue of verbal act, the court quoted Wigmore's outline for "utterances forming a verbal part of an act," a category related to but distinct from verbal acts:

- (1) The conduct to be characterized by the words must be *independently material to the issue*;
- (2) The conduct must be *equivocal*;
- (3) The words must aid in *giving legal significance to the conduct*;
- (4) the words must *accompany the conduct*.²¹

In reviewing the facts of the case, the court held that the dealer's statements constituted the fraud, or, in other words, were the operative verbal acts upon which the bank had sued. That is,

[t]he statements in question were a premise or predicate in a claim for fraud. Under such circumstances [the dealer's] statements were operative facts resulting in legal consequences—rights and liability consequence to fraud—and were verbal acts affecting the bank's rights or bearing on conduct affecting the bank's rights. As verbal acts, [the dealer's] statements were not hearsay.²²

Thus, the court quoted the foundation for "words constituting a verbal part of an act" despite the fact that the case involved nonhearsay verbal acts.

(iii) Words relevant because of impact on the hearer:

Statements may very well be relevant to the issues of any particular case because of their effect on the hearer. Such statements have consistently been held to be nonhearsay. For example, the trial court in *State v. Brady*²³ admitted, as nonhearsay, statements made by a witness to a police officer. The court on appeal affirmed the ruling, reasoning that the statements were relevant to establishing a probable cause basis for investigating the defendant. Similarly, the court in *State v. Bear Runner*²⁴ allowed a statement from Leo Plenty Arrows, who was suffering from a recent beating, to the effect that Bear Runner had beaten him up and was up the street. The statement was allowed to explain why the police had questioned Bear Runner, who later was charged with assaulting the questioning police.

Again, in *State v. Ege*,²⁵ a drunk driving case, the defense sought

21. *Id.* at 408, 390 N.W.2d at 491 (quoting 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1772, at 267-68 (J. Chadbourn ed. 1976)).

22. *Id.* at 411, 390 N.W.2d at 492.

23. 202 Neb. 221, 274 N.W.2d 559 (1979).

24. 198 Neb. 368, 252 N.W.2d 638 (1977).

25. 227 Neb. 824, 420 N.W.2d 305 (1988).

to exclude a statement from a police officer that a service station attendant told her that a motorist had just driven into the station, driven over the curb, and that the driver's breath smelled of alcohol, all on the issue of whether the police officer had a probable cause basis for an investigatory stop. In rejecting the hearsay objection, the court observed that the "informant's statements were not offered for the truth of the matter of the defendant's intoxication; they were offered to show that Officer Hearn formed a reasonable suspicion that the defendant was involved in criminal activity."²⁶

Of course, statements may be relevant because of their effect on the hearer in a variety of contexts. For example, the court in *Vinyard v. Vinyard Funeral Home, Inc.*,²⁷ a slip-and-fall case, allowed testimony of prior complaints that the parking lot surface was slippery when wet, not to prove that it was slippery, but to prove that the defendant had notice of the slippery condition. Similarly, the court in *Gray v. Maxwell*,²⁸ an action by a mother to regain custody of her child from prospective adoptive parents to whom she had relinquished her parental rights, admitted a taped conversation made to the mother because of its effect on the hearer. The court explained that the evidence was "ultimately, to establish whether or not they [the conversations] had an effect upon the voluntariness of her acknowledgement of the relinquishment. An extra-judicial statement not offered to prove the truth of the matter asserted is not hearsay."²⁹

(iv) Words relevant for purposes of impeachment or rehabilitation:

The fact that an in-court witness has previously made a statement that is either consistent or inconsistent with in-court testimony may be relevant on the issue of the witness's credibility. The out-of-court statement is nonhearsay if not offered to prove the truth of the matter asserted, but rather to show either that because the witness has given more than one account of the subject events, his or her testimony is unreliable; conversely, the fact that he or she told the same story at a previous time corroborates the credibility of the witness.

The out-of-court statement, of course, must have been made by the in-court declarant to fit within this nonhearsay category. For example, in *Belitz v. Suhr*³⁰ the defendant, over an hearsay objection, successfully impeached the testimony of a police officer by introduc-

26. *Id.* at 828, 420 N.W.2d at 308.

27. 435 S.W.2d 392 (Mo. 1968).

28. 206 Neb. 385, 293 N.W.2d 90 (1980).

29. *Id.* at 389, 293 N.W.2d at 93.

30. 208 Neb. 280, 303 N.W.2d 284 (1981).

ing the prior contradictory statements that the defendant had made to the police officer, and that the police officer had written down in his investigative report. Reversing on appeal, the court held that a statement by one of the parties cannot be used to impeach the police officer who wrote the party's account down but who recorded a different version of the events.

(v) Nonassertive conduct:

Because section 27-801(1) rejects the *Wright v. Tatham*³¹ hearsay characterization of implied assertions, both verbal and nonverbal conduct not intended to be assertive of the fact for which they are offered are nonhearsay.

c. Controversial Nonhearsay Categories:

(i) Circumstantial evidence of state of mind:

Any statement only impliedly reflective of the declarant's state of mind, or a statement raising a circumstantial inference of state of mind, if in issue, would be nonhearsay as an implied assertion. This is the *Wright v. Tatham* issue previously discussed. It is identified as a controversial category herein because it reverses the earlier common-law view. For example, the court in *Murdoch v. Murdoch*,³² a divorce action and custody dispute, characterized as nonhearsay certain statements between the daughter and her father and statements involving the mother's "coaching" of the daughter during telephone conversations with her father. The court held that the statements were not offered to prove the truth of the matter asserted, but rather were relevant as evidence of (1) expressions of affection and (2) the ability of the mother to influence what the daughter said. In each instance the statements were circumstantial evidence of the state of mind of the daughter.

(ii) Mechanical traces as circumstantial evidence of ownership:

Some courts have held that inscribed chattels or statements contained in mechanical traces are not subject to the hearsay rule. Thus the court in *United States v. Snow*³³ allowed in a "Bill Snow" label to a brief case containing an illegal firearm, on the issue of circumstantial evidence of ownership. Although the "Bill Snow" label arguably is a direct assertion that this brief case belongs to Bill Snow, the very fact in issue in the case, the court held that courts have dis-

31. 7 Eng. Rep. 559 (H.L. 1838), *aff'g* 112 Eng. Rep. 488 (Ex. ch. 1837).

32. 200 Neb. 429, 264 N.W.2d 183 (1978).

33. 517 F.2d 441, 443-44 (9th Cir. 1975).

cretion in characterizing such evidence as a mechanical trace, or circumstantial, or indirect evidence, rather than a statement that needs to satisfy the hearsay rule. Similarly, the court in *United States v. Duffy*³⁴ permitted the introduction of testimony that a T-shirt found in a stolen car had a laundry label "D-U-F" as circumstantial evidence that the shirt belonged to Duffy, and as circumstantial evidence that Duffy had stolen the car.

(iii) Personal knowledge of independently established facts:

Some courts characterize as nonhearsay statements relevant as circumstantial evidence of independently established facts. For example, the court in *Bridges v. State*,³⁵ admitted over an hearsay objection a statement from a seven-year-old assault victim of details of the house where the assault took place made to the police prior to their discovery of the house. The court reasoned that the statements were admissible not to prove the truth of their content, but instead as circumstantial evidence indicating knowledge on the part of the declarant at a particular time.

Hearsay purists argue that because *Bridges*-type statements are subject to the four hearsay risks of insincerity, memory, ambiguity and perception, the statements are hearsay, and if admissible, should only come in under the residual exception.

Nonetheless, this nonhearsay category has received respected support. For example, Judge Weinstein in *United States v. Muscato*,³⁶ carefully went out of his way to discuss at length this type of evidence as a proper nonhearsay category. The declarant in *Muscato* had testified that he at one time had put a gummed label on a gun that was implicated in an illegal-manufacture-of-firearms case. The fact that the gun was found in the possession of one of the coconspirators was used circumstantially to tie the coconspirator to the declarant, who had previously pled guilty. In justifying his nonhearsay ruling, Judge Weinstein discussed with approval *Bridges*, *Kinder v. Commonwealth*,³⁷ in which a defendant was convicted of larceny on the son's knowledge of the location of the cache of stolen goods, and *State v. Galvan*,³⁸ where the court approved in a murder case the introduction of a description by defendant's ex-wife of their two-year-old daughter's apparent unreflective re-enactment of the killing while the youngster was at play.

34. 454 F.2d 809 (5th Cir. 1972).

35. 247 Wis. 350, 19 N.W.2d 529 (1945).

36. 534 F. Supp. 969 (E.D.N.Y. 1982).

37. 306 S.W.2d 265 (Ky. Ct. App. 1957).

38. 297 N.W.2d 344 (Iowa 1980).

(iv) Circumstantial evidence of the nature of the establishment:

A number of courts have admitted as nonhearsay statements that are circumstantial evidence of the nature of the establishment. For example in *State v. Tolisano*,³⁹ the court admitted as nonhearsay telephone calls, such as "put \$2 to win on Blue Nose in the 5th at Belmont," received by the police at a betting establishment during the course of a gambling raid. The court admitted the statements as circumstantial evidence of the nature of the establishment, but they could also be described as verbal acts. Similarly, the court in *United States v. Zenni*,⁴⁰ held that "utterances of the betters [sic] telephoning in their bets were nonassertive verbal conduct, offered as relevant for an implied assertion to be inferred from them, namely that bets could be placed at the premises being telephoned. The language is not an assertion on its face, and it is obvious these persons did not intend to make an assertion about the fact sought to be proved or anything else."⁴¹

(v) Circumstantial evidence of nonhappening from fruitless inquiries or an absence of complaints:

Testimony regarding fruitless inquiries, such as whether anyone heard the shot that was supposed to have been fired, or whether anyone else was poisoned by the food at a restaurant, arguably is nonhearsay because no assertions were intended by the act of silence. Thus in *Silver v. New York Central Railroad*,⁴² the court admitted, over an hearsay objection, testimony that no other passenger had complained about the temperature of a passenger car to rebut plaintiff's claim that it was too cold. There the court cited in support *Landfield v. Albani Lunch Co.*⁴³ where the court allowed in testimony that no other customer that day had complained about the beans. The court explained, however, that the testimony would only be relevant if there has been evidence presented indicating that others were similarly situated and had opportunity for complaining.

III. SECTION 27-801(4): NONHEARSAY BY STATUTORY DEFINITION:

By statutory definition the Federal Advisory Committee recommended and Congress adopted limited declarant-oriented categories of nonhearsay. The Nebraska legislature, with some modifications

39. 136 Conn. 210, 70 A.2d 118 (1949).

40. 492 F. Supp. 464 (E.D. Ky. 1980).

41. *Id.* at 469.

42. 329 Mass. 14, 105 N.E.2d 923 (1952).

43. 268 Mass. 528, 168 N.E. 160 (1929).

and deletions, adopted the same nonhearsay categories. As a foundational prerequisite for nonhearsay status, the out-of-court declarant must testify at trial, be available for cross-examination concerning the out-of-court statement, and the testimony must fall within the narrow limits of the enumerated categories. Each of the nonhearsay-by-statutory-definition categories has additional foundational requirements explained below.

A. INCONSISTENT STATEMENTS:

(1) *Statement of the Rule:*

Nebraska Revised Statutes section 27-801(4)(a)(i) characterizes as nonhearsay any statement: "inconsistent with his [in-court] testimony and [the out-of-court statement] was given under oath subject to the penalty of perjury at trial, hearing, or other proceeding, or in a deposition."⁴⁴

(2) *Legislative History:*

The legislative history indicates that the Nebraska Unicameral was aware that allowing certain prior inconsistent statements to be used for substantive, as well as impeachment purposes, "is a departure from prior Nebraska law."⁴⁵ The Practice and Procedure Committee justified the departure on the grounds that the prior rule is "hypocritical since it tells the jury to do something it cannot do. It has real legal effect only in the situation in which the plaintiff's only evidence is a prior statement of a witness who now tells the opposite at trial and would therefore be subject to a directed verdict."⁴⁶

(3) *Foundational Elements:*

To qualify for nonhearsay treatment under this rule the out-of-court statement must be (1) inconsistent with the witness's in-court testimony, and (2) given under oath in a prior proceeding.

(4) *Interpretive Analysis:*

a. Inconsistent

The most difficult issue this rule presents is determining whether the in-court and out-of-court statements are sufficiently contradictory to qualify as inconsistent statements. For example, the

44. NEB. REV. STAT. § 27-801(4)(a)(i) (Reissue 1989).

45. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE & PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 801, at 126 (1973) (hereinafter PROPOSED NEBRASKA RULES).

46. *Id.* at 127.

court in *State v. Bennett*⁴⁷ considered whether the witness's statements in a prior trial were inconsistent with in-court testimony that was much more equivocal in a second trial. The coconspirator witness had testified in the previous trial that the defendant had been involved with the witness in stealing televisions from a motel. That case ended in a mistrial. In the second trial the witness was more tentative in connecting the defendant with the crime. To establish the defendant's involvement the prosecution offered in the former testimony. On appeal the court upheld the introduction of the prior statement as sufficiently inconsistent to justify admission under this rule.

However, there are limits to how far the courts will stretch the concept of "contradictory." For example, the court in *State v. Marco*,⁴⁸ addressed the issue of whether a witness testifying in court that "I don't remember" qualifies under this rule as an inconsistent statement to previous testimony where the witness could recall. The court stated that the trial court has substantial discretion in evaluating whether an equivocal statement qualifies as an inconsistent statement. However, the court reversed because the prosecution called the defendant's daughter knowing that she would not testify against her father simply to get in the prior inconsistent statement. The court explained that "[p]rejudice, disguised as impeachment, appears to have slipped into this case."⁴⁹

The same notion, that prior inconsistent statements should not be offered for the primary purpose of getting in otherwise inadmissible evidence, is the main theme of *State v. Jackson*.⁵⁰ In *Jackson*, the prosecution believed that the defendant's aunt had previously implicated the defendant as having been involved in a bank robbery. When the aunt refused to acknowledge that she was aware that her nephew had been involved in an armed robbery, the prosecution asked the aunt whether she had ever told her neighbor that guns found in her closet were placed there by her nephew for safe keeping. The defense objected on the basis of improper impeachment, but the court overruled the objection. The neighbor, though a witness, was never asked about the prior statement. Reversing and remanding on appeal, the court condemned the practice as improper impeachment: "An interrogator may not inquire of a witness, 'Isn't it true that you told X that you saw Y shoot Z?' leaving the impression that such was the case, and then not call X to establish that fact."⁵¹

47. 219 Neb. 601, 365 N.W.2d 423 (1985).

48. 220 Neb. 96, 368 N.W.2d 470 (1985).

49. *Id.* at 101, 368 N.W.2d at 474.

50. 217 Neb. 363, 348 N.W.2d 876 (1984).

51. *Id.* at 366, 348 N.W.2d at 878.

The court further stated that a party cannot use a prior inconsistent statement under the guise of impeachment for the primary purpose of placing before the jury substantive evidence that is not otherwise admissible.

b. Under oath in a prior proceeding:

The prior inconsistent statement has to be made under oath in a prior proceeding to qualify. The court in *State v. Williams*⁵² reiterated the fact that the prior proceeding requirement is foundational to admitting an inconsistent statement as substantive evidence. In *Williams*, a murder case, the defendant argued that he had been convicted as a result of an ineffective counsel, partially because his counsel failed to introduce as substantive evidence a prior statement of his ex-wife that the defendant had been crazy when he committed the murders. However, the court held that since the statements had not been given under oath in a prior proceeding, they would have been inadmissible hearsay on the issue of the defendant's sanity even if the statement had been inconsistent with her in-court testimony.⁵³ To the same effect, the court in *State v. Isley*⁵⁴ held that the testimony of one witness to the effect that another witness had told her a different story than he had related during the trial, could not be introduced as substantive evidence because such statements are nonhearsay "only if the prior statement was given under oath."⁵⁵

In comparison, the court in *State v. Jackson*⁵⁶ admitted as substantive evidence a prior inconsistent statement that the witness had made at the defendant's preliminary hearing, which the court incidentally held to be improper impeachment evidence because the witness on cross-examination admitted making the prior inconsistent statement.

The fact that the prior statement was given under oath, by itself, will not suffice. For example, in *State v. Johnson*⁵⁷ the court considered the admissibility under this rule of a series of out-of-court statements made by an eleven-year-old victim of a sexual assault who later testified at trial. The boy initially told the police of the assault, but then changed his story when the defendant, the mother's boyfriend, threatened to get the custody changed if he testified. In response to the threats, the mother had the son go to the defendant's office and give a sworn statement that the defendant was not in-

52. 224 Neb. 114, 396 N.W.2d 114 (1986).

53. *Id.* at 124, 396 N.W.2d at 121.

54. 195 Neb. 539, 239 N.W.2d 262 (1976).

55. *Id.* at 544, 239 N.W.2d at 266.

56. 217 Neb. 363, 348 N.W.2d 876 (1984).

57. 220 Neb. 392, 370 N.W.2d 136 (1985).

volved. At the trial the boy testified that the defendant had assaulted him. On cross-examination the boy admitted to the prior inconsistent statements, but on redirect explained that they had been coerced. The court excluded extrinsic evidence of the prior statements as both improper impeachment and an improper prior inconsistent statement under this rule. On appeal the defendant argued that the statements qualified as a prior inconsistent statement given under oath. The court denied that a sworn statement taken as part of one side's investigation of the case qualifies as a "proceeding" for the purpose of this rule. The court further stated that under Nebraska Revised Statutes section 27-613 extrinsic evidence of the statement itself would be inadmissible where the witness admitted the prior statement.

Even if the prior inconsistent statement has been given in a prior proceeding, counsel would be well advised to cross-examine the declarant while he or she is testifying, rather than attempting to get the prior inconsistent statements in through another witness. For example, the court in *State v. Antillon*⁵⁸ considered the admissibility of a prior statement given by a child sexual assault victim in a prior adjudicative hearing. The victim testified, but was not cross-examined regarding the prior statement. The defendant thereafter attempted to get in, through other witnesses, discrepancies between the victim's in-court testimony and the victim's testimony at the earlier adjudicative hearing. The trial court sustained the attempt as improper impeachment because under Nebraska Revised Statutes section 27-613 (Reissue 1989) a witness must be given an opportunity to explain or deny any prior inconsistencies before extrinsic evidence of such inconsistencies may be admissible. The court also noted that a victim is not a party opponent for the purpose of admitting prior statements as admissions.⁵⁹ The court, however, failed to discuss the effect section 27-801(4)(a)(i) has when a witness is not cross-examined regarding the prior statement.

B. PRIOR CONSISTENT STATEMENTS:

(1) *Statement of the Rule:*

Nebraska Revised Statutes section 27-801(4)(a)(ii) characterizes as nonhearsay any statement that is: "consistent with his [in-court] testimony and is offered to rebut an express or implied charge against him or recent fabrication or improper influence or motive."⁶⁰

58. 229 Neb. 348, 426 N.W.2d 533 (1988).

59. *Id.* at 355, 426 N.W.2d at 538.

60. NEB. REV. STAT. § 27-801(4)(a)(ii) (Reissue 1989).

(2) *Legislative History:*

The legislative history of this rule indicates an awareness that the treatment of prior consistent statements where there has been a charge of recent fabrication as substantive evidence "changes Nebraska law."⁶¹ The Committee observed, however, that Federal Rule 106, the rule of completeness, would probably provide a basis for the admission of such statements in any event.⁶²

(3) *Foundation:*

The foundational basis for a prior consistent statement offered as substantive evidence is less restrictive than the rule for prior inconsistent statements. Essentially, if (1) the opponent either through cross-examination or rebuttal evidence opens the door by making charges or inferences that the in-court witness recently fabricated the testimony or was subject to some improper influence, and (2) the witness has previously made a prior consistent statement, then the prior statement will be admissible as substantive evidence.

(4) *Interpretive Analysis:*

For example, in *State v. Johnson*,⁶³ discussed above, the court admitted a prior consistent statement previously made by the mother to rebut the defendant's cross-examination of the mother which had left the impression that the mother had recently made up the child-abuse story. The court came to the same result on similar facts in *In re Interest of D.J.*⁶⁴ In this termination of parental rights case, the children and their mother testified regarding the abuse they had suffered at the hands of the father. On cross-examination the defendant suggested that the children had recently fabricated their testimony, which led the prosecution to introduce prior consistent testimony of the witnesses that they had previously given to police officers and social workers regarding the events. The court, on appeal, citing section 27-801(4)(a)(ii), held that the defendant had opened the door to the introduction of the prior statements by suggesting that he was a victim of a recently fabricated plot.⁶⁵ To the same effect, the court in *State v. Gregory*⁶⁶ upheld the admission of prior consistent statements made by assault victims to the police on

61. PROPOSED NEBRASKA RULES, *supra* note 45, at 128.

62. *Id.*

63. 220 Neb. 392, 370 N.W.2d 136 (1985). See *supra* note 54 and accompanying text.

64. 224 Neb. 226, 397 N.W.2d 616 (1986).

65. *Id.* at 232, 397 N.W.2d at 620 (citing *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985)).

66. 220 Neb. 778, 371 N.W.2d 754 (1985).

the day of the shooting where the defendant had expressly charged that the boys had recently fabricated their in-court testimony. There the court, citing *Johnson*, held that "it is clear that the statements about which Sergeant Cooper testified were not hearsay."⁶⁷

In comparison, the court in *State v. Packett*,⁶⁸ a kidnapping and armed assault case, refused to admit a tape recording of the witness's prior statements where the witness changed his story on cross-examination. The court rejected the testimony because there had been no allegation of recent fabrication or improper influence, apart from the issue of consistency. Further, the tape recording was inadmissible extrinsic evidence under section 27-613 because the witness admitted making the prior statement.

If the foundation for section 27-801(4)(a)(ii) is lacking, such statements may alternatively be offered for the limited purposes of corroboration or rehabilitation. Corroborative evidence was specifically required as a part of the state's prima facie case for sexual assault cases until Nebraska Revised Statutes section 29-2028 abolished that requirement in 1989.⁶⁹ Thus in many sexual assault cases prior to 1989 consistent statements were deemed admissible to satisfy the common-law corroboration requirement.⁷⁰

The court in *State v. Williamson*,⁷¹ considered the effect on proffered corroboration evidence of the statutory elimination of the corroboration requirement in sexual assault cases. In *Williamson* the prosecution had not gone into the prior reports of the assault on direct examination of the victim. However, when defense counsel elicited on cross-examination of the victim an admission that he had failed to report the alleged incidents to other family members, the prosecution was allowed on redirect to ask the victim about the prior reports he had made to others. This would seem to qualify as a prior consistent statement admissible under section 27-801(4)(a)(ii) because the defendant opened the door by suggesting recent fabrication of the story. The court instead stated that "the statements were offered not for the truth of the assertions, but were offered to prove that the statements were made, and thus they were not hearsay."⁷² Apparently the court found the statements admissible solely for corroborative purposes, reasoning that the statute had eliminated the

67. *Id.* at 787, 371 N.W.2d at 761.

68. 206 Neb. 548, 294 N.W.2d 605 (1980).

69. NEB. REV. STAT. § 29-2028 (Reissue 1989).

70. *See, e.g.*, *State v. Stone*, 228 Neb. 389, 422 N.W.2d 568 (1988); *State v. Schon*, 227 Neb. 482, 418 N.W.2d 242 (1988); *State v. Polyascko*, 224 Neb. 272, 397 N.W.2d 633 (1966); *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981).

71. 235 Neb. 960, 458 N.W.2d 236 (1990).

72. *Id.* at 963, 458 N.W.2d at 238.

mandatory but not permissive use of corroborative evidence in sexual assault cases. Other courts have held that the prior-consistent-statement rule does not apply to statements used for rehabilitation alone.⁷³

C. PRETRIAL IDENTIFICATION TESTIMONY:

(1) *Statement of the Rule:*

Nebraska omits the pretrial identification category of nonhearsay statements. Federal Rules of Evidence, Rule 801(d)(1)(C) characterizes as nonhearsay any statement which is "one of identification of a person made after perceiving him."⁷⁴

(2) *Legislative History:*

The pretrial identification rule was omitted in Nebraska. The Committee on Practice and Procedure observed that they were not aware of any pertinent case law. The Committee noted that pretrial identification testimony may be admissible under the limited circumstances provided by section 27-801(4)(a)(i) for inconsistent statements given under oath in a prior proceeding, or by section 27-801(4)(a)(ii) for consistent statements that have been challenged as recent fabrications. The Committee, however, expressed no necessity for extending nonhearsay treatment to other instances of pretrial identification testimony.

In comparison, the Federal Advisory Committee recommended categorizing pretrial identification as nonhearsay in the proposed Rule 801(d)(1)(C). Congress inexplicably eliminated the rule when the rules were originally adopted on July 1, 1975, but quickly reinserted the rule as an amendment, effective October 31, 1975. Proponents of the amendment argued that the deletion of prior identification testimony had been "the most incomprehensible action of Congress in modifying the Rules of Evidence."⁷⁵

(3) *Foundation:*

The foundation for pretrial identification under the Federal Rules includes (1) the witness observed a person commit some act, (2) the witness subsequently identified the person as the one who committed the act, and (3) the witness is in court subject to cross-examination.

73. See, e.g., *United States v. Bowman*, 798 F.2d 333 (8th Cir. 1986); *United States v. Pierre*, 781 F.2d 329 (2d Cir. 1986).

74. FED. R. EVID. 801(d)(1)(c).

75. 121 CONG. REC. H31867 (daily ed. Oct. 6, 1975) (statement of Rep. Hyde, quoting Judge Weinstein).

(4) *Interpretive Analysis:*

One exception to the common-law rule prohibiting self-corroboration recognized from "time immemorial" has been the pre-trial identification of the criminal accused.⁷⁶ Wigmore condemned those who would urge an hearsay objection to such testimony, stating: "[t]his is a simple dictate of common sense, and was never doubted in Orthodox practice. That some modern Courts are on record for rejecting such evidence is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning."⁷⁷ Of course, a declarant-oriented definition of hearsay would allow in prior statements of witnesses who testified at the trial and were subject to cross-examination.⁷⁸

Notwithstanding Nebraska's omission of pretrial identification testimony from the nonhearsay categories, it appears from a review of the case law that Nebraska criminal defense attorneys have raised only constitutional and not hearsay objections to pretrial identification testimony.⁷⁹ That is, Nebraska practitioners have not raised legitimate hearsay objections to pretrial identification testimony.

From a constitutional perspective, pretrial identification testimony raises both right to counsel and due process issues. The United States Supreme Court for the first time in *United States v. Wade*⁸⁰ held that unless counsel is present at a post-indictment lineup, the lineup identification is inadmissible and the in-court identification is similarly inadmissible unless the prosecution establishes that the in-court identification has a separate origin from the pretrial lineup identification. In *Kirby v. Illinois*,⁸¹ in comparison, the Court held that an accused is not entitled to counsel at a police-station showup which occurred before the defendant had been formally charged.

The Supreme Court also considered the due process implications of pretrial identification in *Stovall v. Denno*,⁸² a case decided the same day as *Wade*. In *Stovall*, the defendant argued that a one-man emergency showup had been impermissibly suggestive in violation of the due process clause. *Stovall*, a black defendant, had been brought handcuffed by a white police officer to the victim's hospital bed for

76. R. CROSS, EVIDENCE 219 n.2 (4th ed. 1974).

77. 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1130, at 279 (3d ed. 1940).

78. See 5 J. WIGMORE, *supra* note 77, § 1362, at 3-7 (4th ed. 1940); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 175, 192 (1940).

79. See Mangrum, *Doesn't Anyone in Nebraska Realize that Pretrial Identification Testimony Raises Hearsay as Well as Constitutional Issues?*, 20 CREIGHTON L. REV. 335 (1986-87).

80. 388 U.S. 218 (1967).

81. 406 U.S. 682 (1972).

82. 388 U.S. 293 (1967).

identification purposes. In upholding the admissibility of the identification, and announcing the "totality of the circumstances" test, the Court held that pretrial identification testimony would be excluded as a matter of due process only if the presentation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."⁸³

The Supreme Court of Nebraska has similarly had occasion to consider the constitutionality of pretrial identification evidence. In *State v. Randolph*,⁸⁴ the court held that the right to counsel does not extend to prearrest photographic lineup identification procedures.⁸⁵ The court in *State v. Smith*⁸⁶ more specifically explained that the right to counsel "attaches only at or after the time the adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information."⁸⁷

The Supreme Court of Nebraska has regularly applied the *Stovall* "totality of the circumstances" test to a variety of pretrial identification cases. For example, in *State v. Sanchell*⁸⁸ one of the rape victims had been unable to make a positive identification of the defendant from either his mug shot or a post-arraignment show up. The victim, however, thereafter identified the defendant at the suppression hearing and later at trial. The court reversed and remanded because the victim's pretrial identification "was the product of the tainted showup . . . and the suggestive circumstances which preceded and followed it."⁸⁹ In comparison, the court approved showup identification testimony in *State v. Nance*,⁹⁰ where the defendant refused to participate in a lineup. Similarly, the court approved of showup identification testimony in *State v. Jackson*,⁹¹ where a service station attendant identified the defendant as the robber at a showup at the service station, and in *State v. Johnson*,⁹² where a janitor identified

83. *Id.* at 302.

84. 186 Neb. 297, 183 N.W.2d 225 (1971).

85. *See also* *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976) (precharge showup); *State v. Sanchell*, 191 Neb. 505, 216 N.W.2d 504 (1974) (precharge showup).

86. 209 Neb. 86, 306 N.W.2d 181 (1981).

87. *Id.* at 87, 306 N.W.2d at 182 (quoting *Kirby v. Illinois*, 406 U.S. 682, 688 (1972)). *See also* *State v. Johnson*, 214 Neb. 869, 336 N.W.2d 581 (1983); *State v. Moss*, 187 Neb. 391, 191 N.W.2d 543 (1971).

88. 191 Neb. 505, 216 N.W.2d 504 (1974).

89. *Id.* at 521, 216 N.W.2d at 514. The court, on the other hand, approved the pre-trial identification of a second rape victim who had been able to identify the defendant at the post-arraignment show up, despite the fact that she had been ambivalent about a mug-shot identification.

90. 197 Neb. 95, 246 N.W.2d 868 (1976).

91. 209 Neb. 486, 308 N.W.2d 527 (1981).

92. 214 Neb. 869, 336 N.W.2d 581 (1983).

the defendant as the burglar both while on the scene and shortly thereafter at the police station through a one-way window.

The Supreme Court of Nebraska has also approved of, against constitutional challenges, pretrial identification testimony based upon corporeal lineups,⁹³ photographic lineups⁹⁴ and mug-shots. Mug-shot testimony raises separate due process problems because of the prejudicial effect of the witness connecting the defendant to past criminal activity. In *State v. Atwater*,⁹⁵ for example, the court reversed and remanded because the officer repeatedly referred to the identification photos as "mug shots" that had been collected from likely suspects with a known history for such offenses. In comparison, the court permitted "mug shot" testimony in *State v. Holloman*,⁹⁶ *State v. Auger*,⁹⁷ and *State v. Swoopes*.⁹⁸

What is curious about all these pretrial identification cases where the constitutional standards for such testimony were briefed and argued for the most part unsuccessfully, none of the cases even mention that under the Nebraska Rules of Evidence all of this testimony is inadmissible hearsay. Even though Nebraska did not adopt a state counterpart to Federal Rule of Evidence 801(d)(1)(C), the courts and the practitioners have acted as if pretrial identification testimony does not present an hearsay issue.⁹⁹

D. ADMISSIONS:

Admissions are recognized as nonhearsay because, as a matter of adversarial justice, the cross-examination of oneself or one's agent is thought less necessary as a matter of due process. Not only are state-

93. *State v. Smith*, 209 Neb. 86, 306 N.W.2d 181 (1981); *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980); *State v. Joseph*, 202 Neb. 268, 274 N.W.2d 880 (1979); *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977); *State v. Banks*, 195 Neb. 340, 237 N.W.2d 875 (1976).

94. *State v. Van Egmond*, 206 Neb. 356, 293 N.W.2d 74 (1980); *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

95. 193 Neb. 563, 228 N.W.2d 274 (1975).

96. 197 Neb. 139, 146, 248 N.W.2d 15, 19-20 (1976).

97. 200 Neb. 53, 262 N.W.2d 187 (1978).

98. 223 Neb. 914, 395 N.W.2d 500 (1986).

99. In an article discussing the failure of the practitioners and courts to see the hearsay issue involved in pretrial identification testimony, the author recommended the following statutory amendment to the Nebraska Rules of Evidence:

(4) a statement is not hearsay if—

(a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

(iii) one of identification of a person where the declarant, while testifying, corroborates that he or she made a prior identification. When prior identification testimony is introduced, then an adverse party is entitled to introduce evidence of the circumstances surrounding the prior identification, including any photographs associated with the testimony. Mangrum, 20 CREIGHTON L. REV. at 359.

ments by party opponents nonhearsay by definition, many courts relax the foundational requirements for admitting such statements. For example, first-hand knowledge, a foundational requirement for other hearsay exceptions, is often relaxed for admissions on the theory that as a matter of adversarial fairness the party opponent is well situated to explain the context of the statement. Thus in *Reed v. McCord*,¹⁰⁰ the court permitted the introduction of a statement of an employee to the coroner against the employer regarding the defective machine causing the injury, despite the fact that the employee had not been present when the accident occurred and had only learned of the events upon investigation. More recently the United States Court of Appeals for the Eighth Circuit, in *Mahlandt v. Wild Canid Survival & Research Center, Inc.*¹⁰¹ admitted the statement of an agent for the defendant corporation that the injuries suffered by a child were the result of an attack by a wolf, one of the corporation's research animals. Similarly, the United States Court of Appeals for the Seventh Circuit, in *MCI Communications Corp. v. American Telephone & Telegraph Co.*,¹⁰² upheld the admission of an internal AT&T study which reflected statements by corporate managers made within the scope of their duties despite the fact that their statements contained opinions and hearsay.

(1) *Personal Admissions:*

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-801(4)(b)(i) characterizes as nonhearsay any statement by a party-opponent which is: "his own statement, in either his individual or representative capacity."¹⁰³

B. LEGISLATIVE HISTORY:

Nebraska adopted the Federal Rule with respect to personal admissions. The Committee observed that the rule, although similar to Nebraska's prior law, may change it in several respects. First, Nebraska case law previously treated admissions as exceptions, rather than nonhearsay, a distinction the Committee characterized as one "essentially tilting at windmills."¹⁰⁴ Second, the Committee noted that prior Nebraska law may have limited admissions under the opinion rule, but that the limitation was unclear in any event.¹⁰⁵ Third,

100. 160 N.Y. 330, 54 N.E. 737 (1899).

101. 588 F.2d 626 (8th Cir. 1978).

102. 708 F.2d 1081 (7th Cir. 1983).

103. NEB. REV. STAT. § 27-801(4)(b)(i) (Reissue 1989).

104. PROPOSED NEBRASKA RULES, *supra* note 45, at 129.

105. *Id.*

the Committee noted the extension to admissions by persons in representative capacities may be contrary to prior law,¹⁰⁶ and if so, recognized that the prior law would be superseded by the statute.¹⁰⁷

C. FOUNDATION:

The foundation for personal or representational admissions is quite brief: (1) the witness heard the party-opponent make a statement, and (2) the party-opponent had first-hand knowledge of the subject of the statement (a requirement that often will be relaxed). Of course, the foundation for admissions in criminal cases is subject to constitutional limitations and *Miranda* warning requirements.

D. INTERPRETIVE ANALYSIS:

A statement by a party-opponent is the clearest example of an admission which will not be excluded by the hearsay rule. In *State v. Williamson*,¹⁰⁸ for example, the court upheld the admission of letters written by the defendant while in prison describing specific sexual offenses that he had committed against his stepchildren. Similarly, the court in *State v. Boham*,¹⁰⁹ a case involving charges that the defendant had intentionally run a nonunion truckdriver off the road in response to the defendant's support of union employees in a labor dispute, held that the defendant's statements to a security guard that he had had a "run in" with the nonunion driver was admissible as an admission. To the same effect the defendant's guilty plea to the criminal charge of third degree sexual assault of his six-year-old daughter was admissible as an admission in subsequent mental commitment proceedings.¹¹⁰

The "admission" category extends to statements made by the real party in interest even though the party may not be named as a party in the particular action. For example, the court in *Schmidt v. Schmidt*¹¹¹ held that a deceased mother was the real party in interest in an action by the mother's conservator to recover money allegedly advanced to the son by his mother. Accordingly, her previous statements offered by the son were admissions. Similarly, the court in *In re Estate of Krueger*¹¹² held that a decedent aunt's earlier

106. *Id.* (citing *Degmetich v. Beranek*, 188 Neb. 659, 199 N.W.2d 8 (1972)).

107. *Id.* at 130.

108. 235 Neb. 960, 458 N.W.2d 236 (1990).

109. 233 Neb. 679, 447 N.W.2d 485 (1989).

110. The Nebraska Mental Health Commitment Act, NEB. REV. STAT. § 83-1059 (1987) makes the Nebraska Rules of Evidence applicable to proceedings under that Act.

111. 228 Neb. 758, 424 N.W.2d 339 (1988).

112. 235 Neb. 518, 455 N.W.2d 809 (1990).

promise to pay her nephew for all his work in helping her with a cow-calf herd and farming operations constituted an admission by the real party in interest when offered by her nephew as a claim against the aunt's estate. Conversely, the court in *State v. Antillon*¹¹³ explained that the statement of a victim of a crime does not qualify as a statement of a party-opponent for purposes of nonhearsay classification.

(2) *Adoptive Admissions:*

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-801(4)(b)(ii) characterizes as nonhearsay: "a statement of which he [a party-opponent] has manifested his adoption or belief in its truth."¹¹⁴

B. LEGISLATIVE HISTORY:

Nebraska adopted the Federal Rule covering adoptive admissions. The Committee observed that the rule is supported by prior Nebraska case law.¹¹⁵

C. FOUNDATION:

The foundation for adoptive admissions includes: (1) a declarant made a statement, (2) the statement was made in the party-opponent's presence, (3) the party-opponent heard and understood the statement, and (4) the party-opponent's behavior either expressly or impliedly affirmed the declarant's statement.

D. INTERPRETIVE ANALYSIS:

The Nebraska Supreme Court had occasion to discuss adoptive admissions in *In re Interest of M.*¹¹⁶ In this termination-of-parental-rights case the mother argued on appeal that the trial court had erred in admitting an adoptive admission. In effect the mother claimed that the abuse problems occurred as a result of her troubled relationship with the father, but that because they were now separated the children would be well protected. The statement, made by the estranged father in the mother's presence, was to the effect that the two were together again. The mother had responded "[e]verything is going perfect," and then had "snuggled up" to the

113. 229 Neb. 348, 426 N.W.2d 533 (1988).

114. NEB. REV. STAT. § 27-801(4)(b)(ii) (Reissue 1989).

115. PROPOSED NEBRASKA RULES, *supra* note 45, at 130.

116. 215 Neb. 383, 338 N.W.2d 764 (1983).

husband.¹¹⁷ The court on appeal held that "[w]here the party against whom a statement is offered is present, hears the statement being made, and makes no objection, the trial court may consider such evidence as an exception to the hearsay rule."¹¹⁸

(3) *Statements by Authorized Agents:*

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-801(4)(b)(iii) characterizes as nonhearsay: "a statement by a person authorized by him [a party-opponent] to make a statement concerning the subject."¹¹⁹

B. LEGISLATIVE HISTORY:

Nebraska adopted the Federal Rule of adoptive admissions. The Committee observed that adoptive admissions frequently involve pleadings in other cases, or superseded pleadings in the case at trial, noting that civil pleadings cannot be used against criminal defendants.¹²⁰

C. FOUNDATION:

The foundation for authorized admissions includes the following: (1) the declarant was an agent of the party-opponent; (2) the party-opponent authorized the declarant to make statements; and (3) the statement is within the scope authorized.

(4) *Statements by Non-speaking Agents:*

A. STATEMENT OF THE RULE:

Nebraska Revised Statute section 27-801(4)(b)(iv) characterizes as nonhearsay: "a statement by his [party-opponent's] agent or servant within the scope of his agency or employment."¹²¹

B. LEGISLATIVE HISTORY:

The Nebraska Rule omits from the language of Federal Rule 801(d)(2)(D) both the language "concerning a matter" as well as the language "made during the existence of the relationship."¹²² The legislative history indicates that the intent was at a minimum to narrow

117. *Id.* at 390, 338 N.W.2d at 768-69.

118. *Id.*

119. NEB. REV. STAT. § 27-801(4)(b)(iii) (Reissue 1989).

120. PROPOSED NEBRASKA RULES, *supra* note 45, at 131.

121. NEB. REV. STAT. § 27-801(4)(b)(iv) (Reissue 1989).

122. Compare FED. R. EVID. 801(d)(2)(D) with NEB. REV. STAT. § 27-801(4)(b)(iv) (Reissue 1989).

this category to require that the statement be made "during the course of his activities on behalf of the principal,"¹²³ rather than extending it to include statements made at any time the declarant continues to be employed by the principal. It is less clear whether the omission of the language "concerning a matter" was meant to further narrow this category so as not to include any and all statements made while the employee was on the job. The legislative history cites with apparent approval *Whitaker v. Keogh*¹²⁴ as authority for classifying nonauthorized statements by agents as admissions, thus suggesting that the Nebraska courts should continue their commitment to an expansive view of agents' statements as admissions.¹²⁵ Nonetheless, no explanation is given in the legislative history indicating why the reference to "concerning a matter" was edited out of the Nebraska Rule.

C. FOUNDATION:

The foundation for Nebraska's category of vicarious admissions includes: (1) the declarant was an agent of the party-opponent, (2) the declarant made the statement during the course of his or her activities on behalf of the party-opponent, and (3) the statement has something to do with the agent's duties on behalf of the party-opponent.

D. INTERPRETIVE ANALYSIS:

The scope of the agents' admissions category has been the subject of much dispute and common law development. Traditionally an agent's statement could only be used against the principal if the principal employed the agent for the purpose of making such statements, a category of statements expressly covered by section 27-801(4)(b)(iii). Because of the restrictive nature of the traditional rule, most common-law jurisdictions expanded the agents' admissions to include nonauthorized statements if they were related to a matter within the scope of the agency. The Federal Rule 801(d)(2)(D) incorporates this expansion of the common law rule by including within the admissions category "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship."¹²⁶

The courts have not been troubled by the more restrictive language of the Nebraska Rule, which omitted the language "concerning

123. PROPOSED NEBRASKA RULES, *supra* note 45, at 131.

124. 144 Neb. 790, 14 N.W.2d 596 (1944).

125. See PROPOSED NEBRASKA RULES, *supra* note 45, at 132-33 (citing *Whitaker v. Keogh*, 144 Neb. 790, 14 N.W.2d 596 (1944)).

126. FED. R. EVID. 801(d)(2)(iv).

a matter." For example, *Chirnside v. Lincoln Telephone & Telegraph*¹²⁷ squarely presented the issue of the scope of the agent's admissions category. *Chirnside* involved a pedestrian-motorist accident brought by the guardian of an eight-year-old child who was struck by a truck driven by an employee of the defendant Lincoln Telephone and Telegraph Company. Shortly after the accident an investigative officer interviewed the driver, who told him that the truck's brakes were not working properly. This statement is exactly the type of non-authorized statement that the traditional common-law rule would have excluded, but that the Federal Rule would admit as a statement made concerning a matter within the scope of the agents' duties made during the existence of the relationship. The question that the court should have addressed is whether the omission of the language "concerning a matter" narrows this category so as to exclude evaluative statements made by agents after an event that explain the agents' view of what happened. Instead the court, without discussion, merely held that "[t]he statement was admitted as an admission of a party pursuant to Nebraska Revised Statute section 27-801(4)(b) (Reissue 1985)."¹²⁸

The case is also confusing because the court held that the driver's deposition was also "clearly admissible under section 27-801(4)(b) as a statement offered against a party in either his individual or a representative capacity."¹²⁹ Because the driver was not a party-opponent, the court must have interpreted the driver's statement as one within a representative capacity. The driver, however, had no representative capacity vis-a-vis Lincoln Telephone and Telegraph. The driver was simply an agent: the suit was not against him personally or representively. If the statements of all agents are deemed statements "within a representative capacity" then subparagraphs (ii) and (iii) of section 27-801(4)(b) are redundant and confusing. The "representative capacity" reference more commonly has been interpreted to encompass statements made by an executor of an estate,¹³⁰ a guardian, or by corporate officers on behalf of the corporation.¹³¹ Accordingly, the precedential value of *Chirnside* as an explanation of the parameters of section 27-801(4)(b)(iv) is limited. If anything, *Chirnside* stands for an expansive interpretation of the scope of statements made by agents which will be admitted as admissions over hearsay objections.

The scope of this nonhearsay category was specifically addressed

127. 224 Neb. 784, 401 N.W.2d 489 (1987).

128. *Id.* at 789, 401 N.W.2d at 494.

129. *Id.* at 791, 401 N.W.2d at 495.

130. *Estate of Shafer v. Commissioner*, 749 F.2d 1216 (6th Cir. 1984).

131. *In re Special Fed. Grand Jury*, 819 F.2d 56 (3d Cir. 1987).

in *Bump v. Firemen's Insurance Co.*¹³² In *Bump*, homeowners brought an action against their insurance company regarding an issue of coverage. On appeal, the court considered whether the trial court had erred in excluding as hearsay a statement made by the insurance company's adjuster to the insureds to the effect that they were covered and that they could go ahead with the repairs. The court concluded that

[u]nquestionably, communication with an insured is a vital and integral part of services rendered by an insurance adjuster for validation or rejection of an insured's claim against the insuring company. Such communication constitutes a statement within the scope of an adjuster's agency or employment by the insurance company. We, therefore, hold that the adjuster's statement made to Brenda Bump concerning insurance coverage supplied by Firemen's policy was admissible under Rule 801(4)(b)(iv).¹³³

More importantly, the court, in an extended discussion of agent's admissions, acknowledged that Nebraska's Rule is patterned after its federal counterpart and noted no differences between the two. In fact, the court quoted with approval references to both Weinstein and McCormick to the effect that "the predominant view now favors broader admissibility of admissions by agents if the statement concerned a matter within the scope of the declarant's employment and was made before that relationship was terminated."¹³⁴

(5) *Coconspirator Statements*

A. STATEMENT OF THE RULE:

Nebraska Revised Statute section 27-801(4)(b)(v) characterizes as nonhearsay: "a statement by a conspirator of a party during the course and in furtherance of the conspiracy."¹³⁵

B. LEGISLATIVE HISTORY:

Nebraska adopted the Federal Rule 801(d)(2)(E) relating to statements by conspirators as consistent with Nebraska's then-existing law.¹³⁶

132. 221 Neb. 678, 380 N.W.2d 268 (1986).

133. *Id.* at 688, 380 N.W.2d at 275-76.

134. *Id.* at 686, 380 N.W.2d at 274-75 (quoting MCCORMICK ON EVIDENCE § 267, at 788-89 (E. Cleary 3d ed. 1984); quoted in other terms 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(2)(D)(01), at 801-219 (1985)).

135. NEB. REV. STAT. § 27-801(4)(b)(v) (Reissue 1989).

136. PROPOSED NEBRASKA RULES, *supra* note 45, at 132.

C. FOUNDATION:

The foundation for a coconspirator's statement includes: (1) the declarant was involved in a conspiracy with the defendant; (2) the statement was made while the conspiracy was in progress; and (3) the declarant made the statement in furtherance of the conspiracy.

D. INTERPRETIVE ANALYSIS:

(i) The declarant was involved in a conspiracy with the defendant.

In *State v. Copple*,¹³⁷ the Supreme Court of Nebraska held that before a coconspirator's statement will be admitted as an admission "the trial court must first determine whether the State has proved a prima facie case that (1) a conspiracy existed, (2) the defendant and the witness were members of the conspiracy, and (3) the witness' act was done during and in furtherance of the conspiracy."¹³⁸ The court emphasized that there is a distinction between proving a conspiracy as a crime where proof beyond a reasonable doubt is required, and proving conspiracy foundationally as a prerequisite to the admission of a coconspirator's statements. In the latter instance the court held that a "prima facie showing of conspiracy is sufficient."¹³⁹ The court thus interpreted the preliminary issue of fact standard under Nebraska Revised Statute section 27-104(1) to be satisfied by a minimal "prima facie" standard. The court further observed that the preliminary issue of admissibility often overlaps with the substantive charges, in which case, to avoid repetition and despite the risk of prejudice if the prima facie case cannot be established "the prima facie case of conspiracy may be established as a part of and through the evidence presented to the jury concerning the substantive crime charged against the coconspirator-defendant."¹⁴⁰

The court's statement of the "prima facie standard" in *Copple*, in response to the question how much evidence is required foundationally, follows the traditional common-law rule. However, the federal courts have favored a stricter "preponderance" standard, which was adopted by the United States Supreme Court as the appropriate standard for coconspirator statements in *Bourjaily v. United States*.¹⁴¹ The preponderance standard, of course, is stricter because it requires the judge to actually assess the evidence presented and to make a preliminary finding even if only at the preponderance level. It is not clear whether the Nebraska courts will in the future follow

137. 224 Neb. 672, 401 N.W.2d 141 (1987).

138. *Id.* at 693, 401 N.W.2d at 156.

139. *Id.* at 694, 401 N.W.2d at 156.

140. *Id.* at 694, 401 N.W.2d at 157.

141. 483 U.S. 171 (1987).

Bourjaily's preponderance rule or *Copple's* prima facie rule in assessing the foundational standard.

A second related issue not addressed in *Copple* but bearing directly on the strictness of the foundational standard is whether the court in considering the foundational issue may consider inadmissible evidence including the statement itself. That is, can the prosecution use the statement as a bootstrap to get itself admitted? The Supreme Court of Nebraska specifically addressed the issue in *State v. Bobo*.¹⁴² *Bobo* involved a possession and distribution of marijuana case. To prove that the defendant sold the subject marijuana, the prosecution sought to introduce the statement of David Waegli to the effect that he had accompanied a Bruce Grimbley to the defendant's house, that he had seen the defendant come to the door to let Grimbley in, and that when Grimbley returned with a bag of marijuana he reported that he had made the purchase from Mr. Bobo. In addressing the issue of the admissibility of Mr. Grimbley's statement to Mr. Waegli regarding the identity of the seller, the court stated as "well established" the following rule: "before the trier of facts may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of the conspiracy must be shown by independent evidence."¹⁴³ The court further explained that "[t]he purpose of requiring that the conspiracy be established by independent evidence is to prevent the danger of hearsay evidence being lifted by its own bootstraps, i. e., relying on the hearsay statements to establish the conspiracy, and then using the conspiracy to permit the introduction of what would otherwise be hearsay testimony in evidence."¹⁴⁴ Under the facts of the case, despite the fact that Mr. Waegli later returned to the defendant's home and made a separate purchase of marijuana, the court held the transactions to be distinct and reversed because no independent evidence of the conspiracy had been presented in support of a prima facie case of conspiracy.

The holding in *Bobo*, however, must take into account the Supreme Court subsequent holding to the contrary in *Bourjaily v. United States*.¹⁴⁵ In *Bourjaily*, the Court held that the trial judge, in evaluating the foundation for statements made by coconspirators, may under Federal Rule 104(a) consider the content of the statement

142. 198 Neb. 551, 253 N.W.2d 857 (1977).

143. *Id.* at 557, 253 N.W.2d at 861 (citing *United States v. Nixon*, 418 U.S. 683 (1974); *State v. Merchants' Bank*, 81 Neb. 704, 116 N.W. 667 (1908); Annotation, *Necessity and Sufficiency of Independent Evidence of Conspiracy to Allow Admission of Extrajudicial Statement of Coconspirators*, 46 A.L.R.3d 1148, 1157 (1972).

144. *Id.* at 557, 253 N.W.2d at 861 (citing *Glasser v. United States*, 315 U.S. 60 (1942); *People v. Braly*, 187 Colo. 324, 532 P.2d 325 (1975)).

145. 483 U.S. 171 (1987).

itself. Thus independent evidence of the conspiracy and the context of the statement may not be necessary. Indeed, the Court in *Bourjaily* went out of its way to reject the no-bootstrapping rule as it had been previously applied.

Whether *Bourjaily* is good authority in Nebraska, however, is subject to debate. Nebraska, when it adopted a modified version of the Federal Rules of Evidence, omitted from section 27-104 the language "[i]n making his determination [on preliminary issues] the judge is not bound by the rules of evidence except those with respect to privilege."¹⁴⁶ In explanation the drafting Nebraska Committee stated that "[t]he committee felt this sentence would unduly encourage the trial judge to depart from the usual rules."¹⁴⁷ It is not clear from this omission whether the intent was to require all foundational evidence to be subject to the rules of evidence, including the hearsay rule, or whether the Committee just did not want to emphasize the fact that trial judges have a great deal of discretion in considering foundational issues. Thus it is not clear whether the foundation for a coconspirator's statement in Nebraska may come from the statement itself, as it may in the federal courts under the authority of *Bourjaily*.

(ii) The statement was made while the conspiracy was in progress.

The court in *Bobo* also addressed the scope-of-the-coconspirator's statement category of nonhearsay. The court noted that the statement at issue was made by the alleged coconspirator to the witness as he returned to the car following the buy. The statement merely indicated from whom the marijuana had been purchased. In holding that the statement did not fit the scope of the coconspirator rule in any event, the court explained: "The statement did nothing to further the object of a conspiracy between the defendant and Grimbley to sell marijuana to Waegli. The statement was not made toward the accomplishment of the alleged common object, and was therefore inadmissible under the coconspirator exception to the hearsay rule."¹⁴⁸

146. FED. R. EVID. 104.

147. PROPOSED NEBRASKA RULES, *supra* note 45, at 17.

148. *Bobo*, 198 Neb. at 561, 253 N.W.2d at 863 (citing *United States v. Yow*, 465 F.2d 1328 (8th Cir. 1972); *Stagemeyer v. State*, 133 Neb. 9, 273 N.W. 824 (1937); *Zediker v. State*, 114 Neb. 292, 207 N.W. 168 (1926)).

- (iii) The declarant made the statement in furtherance of the conspiracy.

IV. SECTION 27-802: HEARSAY RULE:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-802 provides that "hearsay is not admissible except as provided by these rules or by other rules adopted by the statutes of the State of Nebraska."¹⁴⁹

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 802. The Committee, in comment, provided a list of illustrations where other Nebraska statutory provisions or Supreme Court Rules provide for the limited admissibility of hearsay evidence: (1) "proof of service by affidavit," (2) "admissibility of depositions," (3) admissibility of "affidavits in summary judgment proceedings," (4) admissibility of "affidavits to determine issues of fact in connection with motions," (5) the admissibility of a "complaint under oath for the issuance of a warrant," and (6) "information available to judge prior to sentencing a convicted criminal."¹⁵⁰ The admissibility of depositions is now covered by Nebraska Supreme Court Rule 32, which provides: "Any part or all of a deposition, so far as admissible under the Nebraska Evidence Rules applied as though the witness were then present and testifying."¹⁵¹

C. FOUNDATION:

The foundation for an hearsay statement follows from the definitional rule and includes: (1) an out-of-court statement by a declarant, and (2) offered to prove the truth of the matter asserted.

D. INTERPRETIVE ANALYSIS:

This Rule is the basic hearsay exclusionary rule. The Rule makes it clear that only the Nebraska Legislature and presumably the Supreme Court of Nebraska pursuant to statutory authority may provide hearsay exceptions. Of course the courts retain some discretionary authority under the residual exceptions, section 27-803(22) and section 27-804(2)(e) to admit trustworthy hearsay evidence in particular cases, but not to create new category exceptions.¹⁵²

149. NEB. REV. STAT. § 27-802 (Reissue 1989).

150. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE & PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 802, at 133 (1973). See NEB. REV. STAT. §§ 25-404, 25-520, 25-910, 25-1267.04, 25-1334, 27-802, 29-2261 (Reissue 1989).

151. NEB. SUPREME COURT R. 32 (1991).

152. NEB. REV. STAT. §§ 27-803(22), 27-804(2)(e) (Reissue 1989).

The courts therefore must exclude hearsay statements if an hearsay objection is raised and no recognized exception is available. The court in *State v. Larkin*,¹⁵³ for example, held that an insurer's out-of-court estimate of the cost of repairing damage to a vehicle, without further testimony by the insurer or the repair person, is inadmissible hearsay. Similarly, the court in *State v. Williams*¹⁵⁴ held that a statement made by a ticket agent at a bus terminal to a police officer that the defendant was the person loitering around the restrooms earlier who had been asked to leave by the off-duty officer, was inadmissible hearsay when offered through the testimony of the police officer.

V. SECTION 27-803: HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL:

At common law an umbrella exception denoted as *res gestae* or "things done" covered excited utterances, present sense impressions, declarations of bodily conditions, and statements of mental conditions, in so far as they directly related to the circumstances, facts, or declarations immediately surrounding the event. The *res gestae* exception has been abandoned by the Nebraska and Federal Rules of Evidence in favor of more specific exceptions.

SECTION 27-803(1): PRESENT SENSE IMPRESSIONS (Nebraska Omits):

A. STATEMENT OF THE RULE:

Nebraska omits the present sense impression hearsay exception codified as Federal Rule of Evidence 803(1). Federal Rule 803(1) excepts from the hearsay exclusionary rule: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."¹⁵⁵

B. LEGISLATIVE HISTORY:

The Committee on Practice and Procedure, without comment, did not recommend this exception.

C. FOUNDATION:

The present-sense-impression exception applies to instances of reflexive speech where there is neither time nor motivation to lie; in which case the testimonial infirmities of sincerity and memory are

153. 222 Neb. 398, 383 N.W.2d 804 (1986).

154. 203 Neb. 649, 279 N.W.2d 847 (1979).

155. FED. R. EVID. 803(1).

less of a problem. The foundational elements of the present sense impression exception as it has developed at common law include: (i) evidence an event occurred; (ii) the declarant had first hand knowledge of the event; (iii) the declarant made the statement during or shortly after the event; (iv) the statement relates to the event; and (v) the declarant was a percipient witness of the event.

D. INTERPRETIVE ANALYSIS:

In the absence of a statutory mandate, the Nebraska courts have not been inclined to recognize the present-sense-impression exception, even in the guise of development through the residual exception. Thus in *State v. Reed*,¹⁵⁶ the court refused to admit a statement made by a six-year-old child to police investigating a disturbance to the effect that the defendant was inside and knew that the police were there, to rebut the defendant's story that he had mistakenly shot a police officer approaching his door, believing that the officer was an intruding, hostile neighbor.

Nonetheless, an overview of the exception is important given Federal Rule 803(1) and the substantial influence the Federal Rules have had on the Nebraska law.

(i) An event occurred.

The Federal Rules do not require any independent, corroborating evidence that the event occurred, although such evidence may have been required at common law. Thus in *Truck Insurance Exchange v. Michling*,¹⁵⁷ the court on appeal reversed the trial court for allowing in the testimony of a worker that he had come home dizzy from hitting his head on the bulldozer at work, where there was no corroborating evidence of the event itself. Because the declarant in this case died in the hospital from a cerebral hemorrhage, the courts in most jurisdictions would allow the "bootstrap" argument that the court on appeal rejected.

(ii) The declarant had first-hand knowledge of the event.

(iii) The declarant made the statement during or shortly after the event.¹⁵⁸

The classic present-sense-impression case is *Houston Oxygen Co.*

156. 201 Neb. 800, 272 N.W.2d 759 (1978).

157. 364 S.W.2d 172 (Tex. 1963).

158. The Federal Advisory Committee recommended the present-sense-impression exception because the "substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." FED. R. EVID. 803(1) (advisory committee's note).

v. Davis.¹⁵⁹ There the court on appeal held it error to have excluded testimony of a witness that when plaintiff's car passed her about four miles before the accident occurred, the witness said that "they must have been drunk, that we would find them somewhere on the road wrecked if they kept that rate of speed up."¹⁶⁰

(iv) The statement relates to the event.

(v) The declarant was a percipient witness of the event.

Some jurisdictions require that the witness on the stand must have witnessed the event—the percipient witness limitation. However, this is generally not required. For example, the court in *Booth v. State*¹⁶¹ allowed a telephone caller to repeat what the person on the other line commented as observing during their conversation: "Brenda is talking to 'some guy behind the door.'"¹⁶² The court, in an extended discussion of the foundational requirements of this exception, expressly rejected the requirement of an equally percipient corroborative witness.

SECTION 27-803(1): EXCITED UTTERANCE:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(1) excludes from hearsay: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."¹⁶³

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 803(2) excited utterance exception as an exception well established under Nebraska law.

C. FOUNDATION:

The foundation for an excited utterance includes: (i) an event occurred, (ii) the event was startling or stressful, (iii) the declarant had personal knowledge of the event, (iv) the declarant made a spontaneous statement about the event, and (v) the statement was made while the declarant was under stress from the excitement of the event.

159. 139 Tex. 1, 161 S.W.2d 474 (1942).

160. *Id.* at —, 161 S.W.2d at 476.

161. 306 Md. 313, 508 A.2d 976 (1986).

162. *Id.* at —, 508 A.2d at 977.

163. NEB. REV. STAT. § 27-803(1) (Reissue 1989).

D. INTERPRETIVE ANALYSIS:

(i) An event occurred.

Again a split exists as to whether any independent corroborating evidence is required that the event actually occurred.¹⁶⁴

(ii) The event was startling, or at least stressful.

This is essentially the rationale for the rule that the statement is a responsive reflex (non-premeditated), in which case memory and sincerity are less at issue.

(iii) The declarant had personal knowledge of the event.

(iv) The declarant made a spontaneous statement about the event.

The spontaneity of the statement is an important element of the excited utterance exception. Spontaneity suggests reliability because of the lack of an opportunity to make a calculated statement. The importance of spontaneity was directly addressed in *State v. Sullivan*.¹⁶⁵ In *Sullivan*, the defendant was convicted of robbing Pete's Place, located near Fremont, Nebraska. At issue on appeal was the admissibility of a statement made by a witness to an investigative officer who arrived on the scene within 5 minutes of the robbery. The witness informed the police officer that he had pulled into Pete's Place just as the driver was driving away. When the police officer informed him that he had been told that the robber had been driving a Ford Fairmont, the witness told him that it was some type of Ford, but not a Fairmont. When the officer suggested that it may have been a Thunderbird, the witness agreed that the car had been an early 1980s Thunderbird. At trial the officer testified to the conversation that he had had with the out-of-court witness about the get-away car. The trial court admitted the statement as an excited utterance. The trial judge had found that (1) the robbery constituted a startling event, (2) the description related to the defendant's get-away car, and (3) the statement was made while the declarant was still under the stress of the exciting event. On appeal the court held that because the witness had to be prompted on the model of the car, the statement was made "after time for conscious reflection."¹⁶⁶

The court reasoned that the absence of spontaneity, the "key requirement for the excited utterance," meant that the statement did not qualify as an excited utterance.¹⁶⁷ The court nonetheless found

164. *Truck Ins. Exch. v. Michling*, 364 S.W.2d 172 (Tex. 1963). See *supra* note 143.

165. 236 Neb. 344, 461 N.W.2d 84 (1990).

166. *Id.* at 348, 461 N.W.2d at 86.

167. *Id.*

the error harmless beyond a reasonable doubt because of its cumulative nature.

- (v) The declarant made the statement while under the stress of excitement.

Again this is the element of substantial contemporaneity thought indicative of sincerity which reduces the problem of memory loss over time. However, less contemporaneity is required here than would normally be required for present sense impressions. Indeed the time requirement varies inversely with the shocking impact of the startling event. *United States v. Napier*¹⁶⁸ provides an extreme example of the variability of the contemporaneity factor. There the kidnapping victim was injured and became unconscious. Weeks later she saw a newspaper article containing a photograph of the defendant. She immediately stated, "He killed me, he killed me." The court upheld the admissibility of this statement as properly within the excited utterance exception.

Because the level of excitement varies with the witness and the startling event, no specific time period can be identified as determinative. For example, the Supreme Court of Nebraska held a statement made by an automobile driver one-half hour after an accident inadmissible in *Callahan v. Prewitt*,¹⁶⁹ but held a statement made by an assault victim one and one-half hours after the assault admissible in *State v. Juarez*.¹⁷⁰

By focusing on the stressfulness of the event, the Supreme Court of Nebraska has expanded the excited utterance exception in cases involving assaults on children almost to the extent that a new hearsay exception has been created. For example, in *State v. R.A.*,¹⁷¹ the court allowed an hearsay statement made five minutes after the child had returned home from a weekend visit with her non-custodial father. There the court accepted a judicial presumption that stress is present in children for some time after a triggering event occurs. Similarly, in *State v. Gonzales*,¹⁷² the court allowed the statement of a thirteen-year-old victim about a sexual assault given despite the fact that he had been frightened by footsteps and a whistle while running one-half mile home after the event.

Without a doubt, the most extreme excited utterance case in Nebraska is *State v. Plant*.¹⁷³ In *Plant*, the defendant was convicted for

168. 518 F.2d 316 (9th Cir. 1975).

169. 141 Neb. 243, 3 N.W.2d 435 (1942).

170. 187 Neb. 354, 190 N.W.2d 858 (1971).

171. 225 Neb. 157, 403 N.W.2d 357 (1987).

172. 219 Neb. 846, 366 N.W.2d 775 (1985).

173. 236 Neb. 317, 461 N.W.2d 253 (1990).

the second degree murder of his eighteen-month-old stepson and for the first degree assault and child abuse of his four-year-old stepson. On appeal the defendant claimed that the trial court had violated both the hearsay rule and the confrontation clause in admitting the out-of-court statements of the defendant's four-year-old stepson and of his own four-year-old daughter relating to the death of another stepson and the injuries sustained by the four-year-old stepson.

The injuries to the children were sustained on May 20, 1988. Two days later the police interviewed defendant's four-year-old daughter in a foster home where the child had been placed. The interview was tape-recorded and the recording was offered and received into evidence and played before the jury. Essentially the testimony indicated that the four-year-old daughter had witnessed the defendant throw the eighteen-month-old child at the four-year-old stepson, and then again saw the child injured as the defendant threw the child on the floor. The prosecution offered the statements both as excited utterances and as statements within the residual exceptions to the hearsay rule. The court on appeal observed that the critical question was whether the four-year-old's recorded statements "were made while she was still under stress from the startling event."¹⁷⁴ In this regard the court opined that "it has been recognized that special circumstances exist with regard to the statements of very small children, and their statements are admitted for the reason that it is unlikely a small child would fabricate stories of abuse."¹⁷⁵ Moreover, the court noted that in child abuse cases the foundational requirements of time lapse and spontaneity are relaxed. Thus, even though the child's responses came as a result of leading questions posed to the child by the examining sheriff, the court held the statements fell within the excited utterance exception. The court added that the statements were also admissible under the residual exception to the hearsay rule. In this regard the court outlined the Supreme Court's illustration of "indicia of reliability" factors discussed in *Idaho v. Wright*,¹⁷⁶ necessary to qualify under the residual exception: "spontaneity of the statement, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate."¹⁷⁷

The court in this case found sufficient indicia of reliability for the statements to qualify under the residual exception as well:

174. *Id.* at 328, 461 N.W.2d at 264.

175. *Id.* (citing *In re Interest of R.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987)). See *supra* note 156 and accompanying text.

176. 110 S. Ct. 3139 (1990).

177. *Plant*, 236 Neb. at 331-32, 461 N.W.2d at 265 (citing *Idaho v. Wright*, 110 S. Ct. 3139 (1990)).

The child was nervous and excited, which demonstrates that she was still under the stress of the event, ensuring reliability of her statements. Given Cindy's tender age, it is unlikely that her statements recounting such horrendous events are unreliable. There is not a scintilla of evidence from which it could be concluded that Cindy had any motive to provide false information. Moreover, her statements incriminated her natural father as opposed to her stepmother. Cindy's statements were made to a police officer, an authority figure commanding truthfulness. Related to this, the interview was conducted by one professionally trained in eliciting the truth from an interviewee. Cindy's statements over the course of her interview with Muldoon were substantially consistent. In view of all the facts that support the findings of the trial court that Cindy's statements were trustworthy, Plant's argument that the leading nature of some of Muldoon's questions detracts from the trustworthiness of the statements is not persuasive.¹⁷⁸

The court left no stone unturned by also holding that the statement qualified under the residual exception of section 27-804, which is identical to section 27-803(22) with the exception of the unavailability requirement. The court found sufficient to establish unavailability a letter from the child's psychologist which stated that forcing Cindy to testify in court would be traumatic "and would precipitate a combination of emotional and behavioral problems."¹⁷⁹

Judge Shanahan, concurring, observed that "this court tilts with temporal windmills en route to the boundary between an 'excited utterance' and hearsay."¹⁸⁰ Among other things, Judge Shanahan points out that the sergeant elicited the interview two days after the event, interviewed the child for twenty minutes before turning the tape recording on, and then led the child throughout the questioning. He suggests that "[t]he State should have been required to present a foundation that Cindy's trauma from observation of the assault caused or produced the account of the incident."¹⁸¹ Judge Shanahan thus would have excluded the testimony as hearsay, but voted to uphold the conviction based on the other evidence properly admitted in the case. It would seem that Judge Shanahan's concurring opinion states the proper interpretation of the excited utterance exception. As it stands under *Plant*, the police will be allowed to interview small children almost without restriction regarding abuse charges, with the assurance that the interview, though conducted by way of

178. *Id.* at 332, 461 N.W.2d at 266.

179. *Id.* at 332-33, 461 N.W.2d at 266.

180. *Id.* at 340, 461 N.W.2d at 270 (Shanahan, J., concurring).

181. *Id.* at 341, 461 N.W.2d at 271.

leading statements, will most likely be admissible if the traumatic impact of the incident on the child has not abated by the time of the interview.

SECTION 27-803(2): STATE OF MIND OR BODILY CONDITION:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(2) excludes from hearsay:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.¹⁸²

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 803(3), state of mind or bodily condition, as expressive of existing Nebraska law.

C. FOUNDATION:

This hearsay exception combines two common law exceptions: (1) present state of mind, and (2) present bodily conditions. The rationale for this exception is that while sincerity is at issue the testimonial infirmities of memory and perception are minimal. The foundational elements include: (i) statement was made (the proponent would have to establish the normal foundation for the statement, such as who made the statement, when, where and the circumstances and substance of the statement); (ii) the statement is expressly assertive of the present state of mind or bodily condition (first-hand knowledge implicit) of the declarant; (iii) if offered to prove conduct then (a) unless it involves a will case, it must pertain to intended conduct, rather than past acts, and (b) it must relate to the conduct of the declarant.

D. INTERPRETIVE ANALYSIS:

- (i) Statement.
- (ii) Expressly assertive of present state of mind or bodily condition.

If an out-of-court statement is only impliedly assertive of the de-

182. NEB. REV. STAT. § 27-803(2) (Reissue 1989).

clarant's state of mind or bodily condition, then the statement would be nonhearsay under the assertion-oriented definition of hearsay.

The overlap between nonhearsay characterization and the applicability of this exception can be illustrated by the case *Zippo Manufacturing Co. v. Rogers Imports, Inc.*¹⁸³ There the court allowed public survey testimony in a trademark infringement case. The court reasoned that surveys are either nonhearsay, within nonassertive conduct, or more aptly, within the present state-of-mind hearsay exception.

Further confusion occurs when the state of mind may be a fact of legal consequence, in which case it would be nonhearsay rather than within the state-of-mind exception. In *Barnes v. Milligan*,¹⁸⁴ for example, the court held that a statement by a person, in an adverse possession claim to the title owner of the land that he intended to pay rent to the owner was within the state-of-mind exception. Actually, the statement was of legal consequence because the elements of adverse possession require an open, notorious and hostile claim of ownership, which the statement refuted. In either event the statement was admissible.

- (iii) If offered to prove conduct, then the statement, if not related to a will case, must relate to the intent (rather than memory) of the declarant, which may inferentially prove that the declarant acted consistent with the expressed intent.

The classic case on state of mind to show future conduct is *Mutual Life Insurance Co. v. Hillmon*.¹⁸⁵ Sallie Hillmon sued two insurance companies on the theory that the body found at Crooked Creek, Colorado, was her husband. The insurance companies defended on the theory that the body found was a Mr. Walters. The insurance companies sought to introduce letters from Walters to his sister that he was in Wichita on his way to Crooked Creek with one Hillmon. The defense's theory was that Hillmon took Walters to Crooked Creek to kill him with the intent of collecting on the insurance policies. The Court held that such statements were admissible under the present-state-of-mind-to-show-future-conduct exception. Although the Federal Rules of Evidence and supporting advisory notes expressed an intent to continue this exception, the notes indicate an intent to limit the testimony to prove the future conduct of the declarant alone and not third parties.

A *Hillmon*-like state-of-mind issue was directly implicated in

183. 216 F. Supp. 670 (S.D.N.Y. 1963).

184. 200 Neb. 450, 264 N.W.2d 186 (1978).

185. 145 U.S. 285 (1892).

State v. Smith.¹⁸⁶ *Smith* involved a second-degree murder conviction of Hattie Smith for the murder of her husband William Brown. The defendant admitted the shooting but claimed self-defense. The shooting occurred in a liquor-store parking lot and her intent was the critical issue for the jury. After the conviction the defense discovered a witness who was willing to testify that immediately prior to the shooting the deceased was playing pool with him, but upon hearing that his wife was down the street in a liquor store parking lot had thrown down his pool stick and said, "I am going to kill that bitch" whereupon he had left the pool hall for the liquor store parking lot where he was shot.¹⁸⁷ In reversing and remanding for a new trial to permit her the opportunity to admit such testimony, the court, without discussion, held the decedent's statement to be within the state-of-mind exception "as a statement of the declarant's then existing state of mind and emotion to show his intent, plan, motive, or mental feeling, and inferentially, his demeanor and actions prior to the shooting."¹⁸⁸

The court again considered state of mind to prove future conduct in *Fite v. Ammco Tools, Inc.*¹⁸⁹ *Fite* involved a wife's workers' compensation claim. The only issue was whether her husband had been killed in the course of his employment. To prove that he was working at the time of his death, the plaintiff offered three statements the decedent had made to others as within the state-of-mind hearsay exception to show future conduct. The first two statements were made the morning of his death to his wife and later his father to the effect that he was going to work. The court held these statements within the state-of-mind exception: "[t]he statements evidenced a present intention to do a future act, and that act was to go to work."¹⁹⁰ The court also upheld the admission of a statement by the decedent to a friend immediately prior to his departure in the aircraft which later crashed, to the effect that he had work to do. The court added that statements of intent related to destination and purpose would not be admissible if not made at or about the time of the act of departure.¹⁹¹

In comparison to the forward-looking state-of-mind evidence represented by *Hillmon*-like cases, the classic case involving an inadmissible, backward-looking state of mind is *Shepard v. United States*.¹⁹² The Court, in a Cardozo opinion, limited the state-of-mind exception

186. 202 Neb. 501, 276 N.W.2d 104 (1979).

187. *Id.* at 505, 276 N.W.2d at 108.

188. *Id.* at 506, 276 N.W.2d at 108.

189. 199 Neb. 353, 258 N.W.2d 922 (1977).

190. *Id.* at 359, 258 N.W.2d at 925.

191. *Id.* at 359-60, 258 N.W.2d at 925.

192. 290 U.S. 96 (1933).

by distinguishing between a *Hillmon*-state-of-mind-to-show-future-conduct situation and a state-of-mind-to-show-past-events case. *Shepard* involved statements by Dr. Shepard's wife as she was dying that "Dr. Shepard has poisoned me."¹⁹³ In defense of excluding the statement as hearsay, Cardozo explained that "[d]eclarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored."¹⁹⁴

The Supreme Court of Nebraska followed this distinction in *State v. Rowe*.¹⁹⁵ There a psychiatrist, through the use of truth serum, attempted to reconstruct the state of mind of the defendant at the time he had murdered, butchered and burned his wife. There the court held that such statements did not fall within the state-of-mind exception because they were backwards looking.

Aside from the future/past distinction for state-of-mind statements, there remains the issue of whether the state of mind of one person can be introduced as evidence of conduct of a person other than the declarant. In *Hillmon*, the state of mind of Walters was used as evidence of Hillmon's future conduct, but the case has been criticized on this point. The Advisory Committee recommended limiting this exception to show the future conduct of the declarant. The courts have not always followed this suggestion. For example, the court in *United States v. Pheaster*¹⁹⁶ declined limiting the state-of-mind exception to prove the future conduct of the declarant alone. In *Pheaster*, the prosecution had charged the defendant with the disappearance of Larry Adell, the sixteen-year-old son of Palm Springs multimillionaire Robert Adell. The statements in issue were those of Adell to the effect that he planned on meeting a man named Angelo in a restaurant's parking lot for the purpose of receiving a free pound of marijuana. The issue was whether the statement was inadmissible because it implicated "Angelo" as well as the declarant's future conduct. Despite recognizing legislative history recommending otherwise, the court upheld the admission of the statement. The court, in support, cited a California opinion, *People v. Alcalde*,¹⁹⁷ wherein statements of the victim were allowed that she was going out with the defendant that night, as evidence that the defendant had met her and murdered her. However, Justice Traynor dissented in *Alcalde*, arguing that the victim's declarations regarding her meeting with the

193. *Id.* at 98.

194. *Id.* at 105-06.

195. 210 Neb. 419, 315 N.W.2d 250 (1982).

196. 544 F.2d 353 (9th Cir. 1976).

197. 24 Cal. 2d 177, 148 P.2d 627 (1944).

defendant cannot be used to implicate the accused without violating the hearsay rule.

SECTION 27-803(3): STATEMENTS MADE FOR MEDICAL DIAGNOSIS OR TREATMENT:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(3) excludes from hearsay: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."¹⁹⁸

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 803(4), statements made for medical diagnosis or treatment, as largely consistent with existing Nebraska law. The Committee noted that prior Nebraska law was unsettled on whether this exception extended to statements regarding past physical feelings, and recognized that this exception eliminates any such uncertainties.¹⁹⁹

C. FOUNDATION:

The foundational requirements for statements made for purposes of medical diagnosis or treatment include: (i) a statement, (ii) made to a health-care provider, (iii) for the purpose of medical diagnosis or treatment.

D. INTERPRETIVE ANALYSIS:

The rationale for this exception is that persons are not likely to fabricate information related to their health history if professional decisions are dependent upon the accuracy of the information supplied. The exception is largely unimportant because of the expansive coverage of section 27-803(2) which covers statements of present physical or mental condition regardless of whether made to a health provider or not. The significance of this exception then may rest in its expansion to cover (1) statements related to causation and (2) statements made for purposes of diagnosis or treatment regarding past bodily condition.

198. NEB. REV. STAT. § 27-803(3) (Reissue 1989).

199. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE & PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 803, at 140 (1973) (hereinafter PROPOSED NEBRASKA RULES).

- (i) A statement:
- (ii) made to a health-care provider:
- (iii) for purposes of medical diagnosis or treatment.

The statement cannot be given for purposes of reconstructing the past, but must instead be given for purposes of medical diagnosis or treatment. For example, the court in *State v. Rowe*,²⁰⁰ a murder and arson case, excluded as hearsay a taped interview between a psychiatrist and the defendant who was put under the influence of a truth serum for the purposes of reconstructing his state of mind when he murdered, butchered and burned his wife. The statements were not made primarily for therapeutic purposes, but rather were prompted for evidentiary purposes.

The court made the same point in *State v. Hardin*.²⁰¹ In *Hardin*, the court again rejected the argument that everything an accused tells a psychiatrist about past events is within the medical diagnosis or treatment exception. The court explained that

[n]othing in experience or logic suggests there is a circumstantial guarantee of trustworthiness in the exculpatory extra judicial [sic] statements of a person accused of a crime relating to what he did or what occurred, even when such statements are made to a psychiatrist or psychologist. Therefore, such statements, while they may sometimes be admissible for purposes of diagnosis . . . ought not to be used as substantive evidence of the truth of what the defendant did or what occurred.²⁰²

The court added in dictum that in civil cases statements made to a physician to the effect that the other person was at fault similarly would normally be excluded.

SECTION 27-803(4): PAST RECOLLECTION RECORDED:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(4) excludes from hearsay:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be

200. 210 Neb. 419, 315 N.W.2d 250 (1982).

201. 212 Neb. 774, 326 N.W.2d 38 (1982).

202. *Id.* at 781-82, 326 N.W.2d at 42-43.

read into evidence but may not itself be received as an exhibit unless offered by an adverse party.²⁰³

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 803(5) for past recollection recorded as consistent with Nebraska law. The Committee noted that the provision allowing the memorandum to be read into evidence but not allowing its introduction unless offered by an adverse party, modifies and supersedes previously existing Nebraska law.

C. FOUNDATION:

The foundation for section 27-803(4) requires (i) the witness previously had first-hand knowledge of the event recorded, (ii) the witness either made or adopted a record of the event, (iii) the event was recorded while relatively fresh in the witness's memory,²⁰⁴ (iv) the witness vouches for the accuracy of the record when made (someone like a police officer may establish this foundation by testifying as to a habitual way of handling certain reports), (v) the witness testifies that he or she cannot completely and accurately recall the event recorded, nor does the recorded version refresh the witness's memory, and (vi) the rule prohibits the introduction of the record itself, but instead requires that it be read into the record; only the opposing counsel may offer the writing as an exhibit.²⁰⁵

D. INTERPRETIVE ANALYSIS:

This exception is often confused with Rule 612, Refreshing Memory. Counsel may use anything, including unauthenticated documents to refresh the witness's memory. The foundation for refreshing memory includes: (i) the witness cannot recall a fact or event, (ii) the witness acknowledges that a writing or object may refresh his or her memory, (iii) the proponent tenders the object or writing to the witness, and asks the witness merely to examine it, (iv) the witness states that the object or writing has refreshed his or her memory, and (v) the witness then testifies from refreshed memory. The object or writing never comes in evidence unless introduced by the opposing counsel pursuant to section 27-612.

203. NEB. REV. STAT. § 27-803(4) (Reissue 1989).

204. The court allowed a 10-month lapse in *United States v. Patterson*, 678 F.2d 774 (9th Cir. 1982).

205. Also NEB. REV. STAT. § 27-106 (Reissue 1989), the rule of completeness, permits the opposing counsel to introduce any contextually important portions of the record.

SECTION 27-803(5): BUSINESS RECORDS EXCEPTION:

A. STATEMENT OF THE RULE:

Nebraska Revised Statute section 27-803(5) excludes from hearsay:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness. The circumstances of the making of such memorandum, report, record, or data compilation, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight.²⁰⁶

B. LEGISLATIVE HISTORY:

The Committee recommended, and Nebraska edited, Federal Rule 803(6), the business records exception. Specifically, section 27-803(5): (1) excludes "opinions or diagnoses" from its scope; (2) eliminates the broad definitional language of "business," which under the Federal Rules includes any calling, whether or not conducted for profit; and (3) includes a statement that the circumstances of the making, including lack of personal knowledge, may be shown to affect its weight. This later modification would seem to liberalize the foundational elements of the business records exception.

C. FOUNDATION:

The foundation for the business records exception includes the following: (i) the record was prepared at or near the time of the event or event recorded, (ii) the report was prepared by a person with a business duty to make the report, (iii) the informant had first-hand knowledge of the fact recorded (recognizing that under the Nebraska modification this may be an issue of weight rather than admissibility), (iv) the business regularly maintained such reports, (v) the report was made in the regular course of business, (vi) the entry is factual in orientation, (vii) the record's "source of information or the method or circumstances of preparation [do not] indicate lack

206. NEB. REV. STAT. § 27-803(5) (Reissue 1989).

of trustworthiness," and (viii) the record has been made in a business setting.²⁰⁷

D. INTERPRETIVE ANALYSIS:

The rationale for the business records exception is that (1) since the business record is routinely relied upon by business employees, (2) employees will necessarily be precise in gathering and reporting the underlying information, (3) but the employee will likely not have a present memory of any particular recorded transaction, (4) in which case the record will be the most reliable evidence available, and (5) to require the employees to all appear at the trial would be inefficient both for the business and for the hearing, which would be unduly protracted as a result. Normally the sponsoring witness for a business record will be a business records custodian, or someone sufficiently familiar with the recording process to be able to provide the necessary foundation.

- (i) The record was prepared at or near the time of the event or event recorded.
- (ii) The report was prepared by a person with a business duty to make the report.

The business duty requirement comes out of *Johnson v. Lutz*.²⁰⁸ The court there held that a police report, which included a statement from a bystander, could not qualify within the business record exception because the bystander did not have a business duty to report accurately the information.

The Supreme Court of Nebraska addressed the bystander problem in *State v. Wilson*.²⁰⁹ In this murder case the court admitted, under the business record exception, police reports of domestic violence previously filed. The reports corroborated the ex-wife's testi-

207. The Supreme Court of Nebraska on occasion has outlined an abbreviated foundation for the business records exception. For example, the court in *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987) (quoting *Crowder v. Aurora Co-Operative Elevator Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986); *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 350 N.W.2d 541 (1984)), summarized the foundational steps necessary in introducing business records as follows: "First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made . . . at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness." *Id.* The brief foundational requirements outlined in *Chalupa* were also cited as a basis for admitting duplicates of a seller's business records in *Omaha World-Herald Co. v. Nielsen*, 220 Neb. 295, 369 N.W.2d 631 (1985). It is not to be expected that this abbreviated description of the business records exception should be relied upon as a substitution for a more complete foundation.

208. 253 N.Y. 124, 170 N.E. 517 (1930).

209. 225 Neb. 466, 406 N.W.2d 123 (1987).

mony that because she feared her ex-husband she had previously lied about the cause of her son's death (she had previously told the police that her son killed himself, but at trial testified that her ex-husband had killed him). The court recognized that the report contained statements of bystanders (the *Johnson v. Lutz* problem), but held that the bystanders' statements were nonhearsay because they had been offered to prove their existence, not their truthfulness. This case is at odds with federal cases such as *United States v. Oates*,²¹⁰ which held that police reports, inadmissible under 803(8) as business records, could not be introduced against the accused in a criminal case. However, unlike its federal counterpart, the Nebraska public record exception does not bar its use in criminal cases.

(iii) The informant had first-hand knowledge of the fact recorded.

Whether lack of first-hand knowledge merely goes to weight rather than admissibility under the Nebraska statute has not clearly been established. The statutory language referencing lack of first-hand knowledge going to weight suggests that this traditional requirement may not be required.

(iv) The business regularly maintained such reports.

The court discussed the "regularly kept" requirement in *Crowder v. Aurora Co-operative Elevator Co.*²¹¹ In this contract dispute between a grain-elevator operator and a farmer, the trial court admitted an "interoffice memo" of the Co-op to the effect that the farmer had refused to deliver any more grain. The Supreme Court of Nebraska on appeal reversed, holding that there was no evidence that the memorandum was a document regularly prepared and kept in the course of the day-to-day business of the Co-op involving sales of corn. That is, no Co-op personnel testified that the memorandum offered was part of the regular record system of the Co-op. The court held that because the document "was an unprecedented document, describing an isolated, if not unique, incident," it did not qualify as a business record.²¹²

In comparison, the same court, in *State v. Spaulding*,²¹³ a check-fraud case, rejected hearsay and confrontation challenges to the admissibility of "bank and credit union records, including deposit slips, statements of account, and checks and drafts deposited or returned

210. 560 F.2d 45 (2d Cir. 1977).

211. 223 Neb. 704, 393 N.W.2d 250 (1986).

212. *Id.* at 716, 393 N.W.2d at 258.

213. 211 Neb. 575, 319 N.W.2d 449 (1982).

unpaid."²¹⁴ The court stated that where the appropriate supervisory personnel provided foundational testimony that the records had been created in the regular course of business, and that it was the regular course of the institution's business to create such documents, or the notations upon them, the documents were admissible under the business records exception. Similarly, in *City of Lincoln v. Bud Moore, Inc.*,²¹⁵ the court admitted under the business records exception the electrical billing records of the city as introduced by the supervisor for consumer accounting.

(v) The report was made in the regular course of business.

This is the *Palmer v. Hoffman*²¹⁶ requirement. In *Palmer*, Justice Douglas for the United States Supreme Court excluded from the business records exception a railroad accident investigative report, reasoning that the report was made in anticipation of litigation, not for purposes of railroading, and therefore was dripping with motive to misrepresent the facts. Accordingly, the business records exception was held to have contained within it a limiting principle that business reports that were not intended to be relied upon by businesses in their regular day-to-day activities were insufficiently trustworthy to be admissible. That is, if the court determines that the business entry is a litigation report rather than a business record it will be excluded from this exception. The courts since *Palmer* have limited its application somewhat. Thus, for example, the court in *Lewis v. Baker*²¹⁷ held that where the railroad was required to file an investigative accident report with the ICC for railroad accidents, the *Palmer* rationale was inapplicable and the report was admissible within the business record exception. Similarly, the court in *Yates v. Bair Transport, Inc.*,²¹⁸ a workers' compensation case, distinguished between different doctor reports depending on the differing motivation behind their preparation. The court allowed the claimant to introduce doctor reports where the doctors had been hired by the employer to challenge the claims, but excluded the reports of the claimant's doctors who had been hired to support the claim.

The Supreme Court of Nebraska, in *State v. Spaulding*,²¹⁹ in upholding the admission of bank and credit union records, observed that it was the regular course of the business of the institution to cre-

214. *Id.* at 578-79, 319 N.W.2d at 452.

215. 210 Neb. 647, 316 N.W.2d 590 (1982).

216. 318 U.S. 109 (1943).

217. 526 F.2d 470 (2d Cir. 1975).

218. 249 F. Supp. 681 (S.D.N.Y. 1965).

219. 211 Neb. 575, 319 N.W.2d 449 (1982).

ate such documents. Conversely, the court in *State v. Wright*,²²⁰ vacated the jury finding that the value of the car stolen was over \$1000, because the court admitted a sales contract for the Blazer on the issue of value. The sales contract for the Blazer was introduced by the sales manager of the automobile dealership from which the Blazer had been stolen. The court admitted the contract indicating a \$5,480 purchase price, over hearsay objection, reasoning that the contract qualified as a business record. On appeal the court held that "[t]he record fails to show that the sales contract was made in the regular course of the business activity," or that it was "made at or near the time of the sale," or that the testifying witness was the "custodian of the business records."²²¹

(vi) The entry is factual in orientation.

At common law the reports had to be factual in nature. The Federal Rules expanded the exception to include "opinions and diagnoses," but the Nebraska Legislature consciously omitted this expansion of the common-law rule.

(vii) The record's "source of information or the method or circumstances of preparation [do not] indicate lack of trustworthiness."²²²

The courts will increasingly be faced with issues as to whether the methodology of producing business records by computers is sufficiently trustworthy to qualify under this exception. The Nebraska Supreme Court, in *Richards v. Artholoney*,²²³ a foreclosure action, summarily ruled that computer printouts are clearly within the business records exception.

(viii) The record is for business purposes.

At common law the exception was limited to the records of businesses conducted for profit, upon the rationale that the entries were more likely to be reliable where the user's reliance has an economic consequence. The modern approach, reflected in Federal Rule 803(6), expands the exception to include any and all records regularly kept. The omission of this provision by Nebraska indicates an intent to narrow the exception in accordance with earlier common-law restrictions.

220. 231 Neb. 410, 436 N.W.2d 205 (1989).

221. *Id.* at 413, 436 N.W.2d at 207.

222. NEB. REV. STAT. § 27-803 (Reissue 1989).

223. 216 Neb. 11, 342 N.W.2d 642 (1983).

SECTION 27-803(6): ABSENCE OF BUSINESS RECORD:**A. STATEMENT OF THE RULE:**

Nebraska Revised Statutes section 27-803(6) excludes from hearsay:

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of subdivision (5) of this section to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate a lack of trustworthiness.²²⁴

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 803(7), excepting absence of business records as consistent with Nebraska law.²²⁵

C. FOUNDATION:

The foundation for absence of business records includes: (1) evidence that a matter is usually included in business records, (2) evidence that a diligent search of the record indicates the nonexistence of any such memorandum, (3) as shown by a business custodian or other qualified witness.

D. INTERPRETIVE DISCUSSION:

Absence of a business record described in section 27-803(6) to prove the nonexistence or nonoccurrence of a matter probably should be characterized as nonhearsay conceptually (since it is merely circumstantial evidence of nonoccurrence, not a statement of anything). Nonetheless, section 27-803(6) provides a hearsay exception lest there be any confusion on the subject.

SECTION 27-803(7): PUBLIC RECORDS EXCEPTION:**A. STATEMENT OF THE RULE:**

Nebraska Revised Statutes section 27-803(7) excludes from hearsay:

Upon reasonable notice to the opposing party prior to trial, records, reports, statements or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the

224. NEB. REV. STAT. § 27-803(6) (Reissue 1989).

225. PROPOSED NEBRASKA RULES, *supra* note 199, at 146.

sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness.²²⁶

B. LEGISLATIVE HISTORY:

Nebraska modified significantly Federal Rule 803(8), the public records exception. First, the Nebraska rule applies only "upon reasonable notice to the opposing party prior to trial."²²⁷ Second, the Nebraska Rule eliminates that portion of the Rule which would admit "in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law."²²⁸ The Committee explained that evaluative reports have not been admissible in Nebraska, and rejected any attempt to so expand this exception. Third, the Nebraska Rule does not expressly exclude matters observed and recorded under duty by law enforcement personnel in criminal cases. Presumably the confrontation clause will provide a limit to such statements in any event.

C. FOUNDATION:

With the exception of the pretrial notice, the foundation for section 27-803(7) parallels the foundation for the business records exception. The foundational elements under Nebraska law include: (i) the record was prepared at or near the time of the fact or event recorded (although section 27-803(7) does not explicitly require contemporaneous recording, the "trustworthiness" criteria will likely demand this foundational step), (ii) the record is in official custody (at common law the record had to be open to public inspection), (iii) the record was properly prepared, (iv) the preparer was a public official, (v) the official had a duty to record the fact (may be judicially noticed or presumed), (vi) the official had personal knowledge of the fact (again implied requirement that the "sources of information" be trustworthy), (vii) the entry is factual in nature, and (viii) pretrial notice is required.

D. INTERPRETIVE ANALYSIS:

The rationale for this exception rests upon the presumption that public employees are diligent in gathering and recording information for their employer, the government. Two additional evidentiary doc-

226. NEB. REV. STAT. § 27-803(7) (Reissue 1989).

227. *Id.*

228. FED. R. EVID. 803(8).

trines facilitate the admissibility of public records: (1) under the doctrine of judicial notice the courts will notice the statute, regulation, or custom requiring that the public official regularly prepare public records, and (2) under the doctrine of self-authentication as codified in section 27-902(2) and (4), properly certified public records may be admitted without the aid of a sponsoring witness who can testify as to their authenticity.

Unlike its federal counterpart, the Nebraska public record exception does not cover investigative reports. Thus the *Johnson v. Lutz*²²⁹ problem of bystanders giving information to public officials who thereafter incorporate that information into a public record will remain an issue for the Nebraska courts. Moreover, counsel needs to be aware of separate statutes specifically covering specific types of investigative reports. For example, Nebraska Revised Statute section 39-6,104.04 requires both the parties involved in automobile accidents and the investigative police personnel to fill out investigative reports. Nonetheless, the statute provides that with the exception of being admissible to prove compliance with the mandatory aspects of the statute, "no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accidents."²³⁰

The Nebraska rule also differs from its federal counterpart because there is no exclusion in criminal cases. This extension to criminal cases, however, cannot fail to take into consideration the confrontation clause.

- (i) The record was prepared at or near the time of the fact or event recorded.
- (ii) The record is in official custody.

In *State v. Rowland*,²³¹ a driving-on-a-revoked-license case, the court, without discussion, held that a license revocation document maintained by the Nebraska Department of Motor Vehicles and provided to the court by the Department qualified as a public record exception to the hearsay rule.

229. 253 N.Y. 124, 170 N.E. 517 (1930).

230. NEB. REV. STAT. § 39-6104.04 (Reissue 1988).

231. 234 Neb. 846, 452 N.W.2d 758 (1990).

- (iii) The record was properly prepared.
- (iv) The preparer was a public official.
- (v) The official had a duty to record the fact.

In *State v. Mills*,²³² the court permitted the introduction of certified copies of FBI records showing the defendant's fingerprints. The court held that the fingerprint records, self-authenticated under section 27-902 where certified as a part of a public record, were within 803(7) because they were a "record made by a public official of facts required to be observed and recorded pursuant to a duty imposed by law."²³³

- (vi) The official had personal knowledge of the fact.

In *Mills*, discussed above, the court observed that the public official had a duty to both observe the fingerprinting and record the results.

- (vii) The entry is factual in nature.
- (viii) Pretrial notice has been given.

The courts have on occasion excused the notice requirement despite the mandatory language of the statute. For example, in *State v. Anderson*,²³⁴ the court admitted a breath analyzer report even though the state had failed to give pretrial notice. The Nebraska Supreme Court excused the prosecution's failure to give notice, reasoning that because the examining police officer testified in court the report could be introduced as nonhearsay. This result seems wrong. The report clearly is being introduced to prove the truth of the matter asserted, that the accused failed the breath test and is hearsay on that ground. Perhaps the officer satisfied the foundation for past recollection recorded, or present recollection refreshed, but the court did not so analyze or discuss these categories or limit the use of the evidence in accordance with their limitations. The court may have been confused regarding the differences between the assertion and declarant-oriented definitions of hearsay.

E. VARIATIONS WITH THE FEDERAL RULES OF EVIDENCE:

The federal counterpart to the Nebraska public record exception, Federal Rule Evidence 803(8), is much more complex and controversial. The complexity arises in part because the rule has three sepa-

232. 199 Neb. 295, 258 N.W.2d 628 (1977).

233. *Id.* at 305, 258 N.W.2d at 634.

234. 213 Neb. 695, 331 N.W.2d 507 (1983).

rate paragraphs and separate standards associated with each. Paragraph (A) permits any party to introduce public records setting forth the activities of an office or agency. Paragraph (B) covers matters observed pursuant to a duty imposed by law where there is a duty to report, but on its face seems to exclude "matters observed by police officers and other law enforcement personnel" in criminal cases introduced by either party.²³⁵ The court in *United States v. Smith*,²³⁶ however, held that (in keeping with paragraph (C)) a criminal defendant may introduce police reports and broadcast transcripts, notwithstanding the literal wording of the statute, which excludes use of police reports in criminal cases. Paragraph (B) is the closest counterpart to both the business records exception and the Nebraska public record exception because it admits those reports where the informant has a business duty to report information for which he has first-hand knowledge. In this regard Federal Rule of Evidence 803(8)(B) parallels the foundation required for Federal Rule of Evidence 803(6).

There is a split of authority as to whether law enforcement investigative findings excluded in criminal cases under 803(8) may be admissible under 803(6). In *United States v. Oates*,²³⁷ the court held that a customs service lab report fell within the "law enforcement" characterization of 803(8), and therefore could not be introduced in lieu of the live testimony of the chemist. The court also reasoned that the confrontation rationale justifying the exclusion also applied to 803(6), in which case the evidence was also inadmissible as a business record. This characterization and result seems wrong. If the state had used a private lab to do the report then ostensibly 803(8) would not apply and the report could be admitted under 803(6). It is not clear why a similar report by a governmental lab ought to be inadmissible.

Paragraph (C) covers findings resulting from an investigation made pursuant to legal authority, but allows only the defendant to use it in criminal cases. This part is especially important because it dispenses with the business record requirement that the persons contributing to the report must *all* be under a business duty. The paragraph seemingly eliminates the *Johnson v. Lutz* requirement. The first-hand knowledge requirement can be read back into the rule, however, by the final sentence allowing exclusion where the sources of information lack trustworthiness.

In addition to the strictures of the public records language, coun-

235. FED. R. EVID. 803(8)(B).

236. 521 F.2d 957 (D.C. Cir. 1975).

237. 560 F.2d 45 (2d Cir. 1977).

sel must investigate separate statutes which may provide for the exclusion of federal investigative reports. Many statutes requiring federal investigative findings provide that such reports are inadmissible for any purpose. Thus, for example, the court in *Travelers Insurance Co. v. Riggs*²³⁸ held that conclusions in a National Transportation Safety Board report could not be admitted because 49 U.S.C. § 1441(e) explicitly prohibits use of such reports in an action for damages.

Federal Rule of Evidence 803(8)(C) relaxes the foundational requirement that the public entry be factual in nature "in civil actions and proceedings against the Government in criminal cases."²³⁹ The United States Supreme Court, in *Beech Aircraft Corp. v. Rainey*,²⁴⁰ in upholding the admission of a JAG investigative report assigning responsibility for an air crash accident to "pilot error," rejected the fact/opinion distinction and explained that a final "provision for escape" is contained in the final clause of the rule . . . 'unless the sources of information or other circumstances indicate lack of trustworthiness.'²⁴¹ The Court further reasoned that this interpretation is consistent with the general relaxing of the traditional barriers to "opinion" testimony in Article 7, namely, Rule 701 allowing laymen to give "opinion" testimony, and Rule 704 allowing opinions even as to ultimate issues. The Court did notice that the statute provides an escape valve if the sources lack trustworthiness.

SECTION 27-803(8): RECORDS OF VITAL STATISTICS:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(8) excludes from hearsay: "Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law."²⁴²

B. INTERPRETIVE ANALYSIS:

The above exception for vital statistics provides a specific exception for certain public records believed to be sufficiently reliable even though the informant is not within the loop of business or public duty to observe and record. The foundation follows the public record foundation with the omission of the requirement that the public offi-

238. 671 F.2d 810 (4th Cir. 1982).

239. FED. R. EVID. 803(8)(C).

240. 488 U.S. 153 (1988).

241. *Id.* at 167 (quoting FED. R. EVID. 803(8)(C)).

242. NEB. REV. STAT. § 27-803(8) (Reissue 1989).

cial have first-hand knowledge of the event and a duty to record the event.

SECTION 27-803(9): ABSENCE OF PUBLIC RECORDS: See section 27-803(6) above for a similar exception for business records.

Nebraska Revised Statutes section 27-803(9) excludes from hearsay:

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with section 27-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation or entry.²⁴³

SECTIONS 27-803(10-12, 17, 21); section 27-804(b)(4) RELIGIOUS AND FAMILY RECORDS AND REPUTATION OR PREVIOUS JUDGMENTS RELATING TO FAMILY HISTORY; STATEMENTS OF FAMILY HISTORY BY FAMILY MEMBERS OR THOSE INTIMATELY ASSOCIATED WITH THE FAMILY:

These exceptions provide for the admissibility of family history information whether contained in religious records (section 27-803(10)), religious or public certificates (section 27-803(11)) or family records of any kind (section 27-803(12)), or which is a matter of family reputation (section 27-803(17)) or previous judgment (section 27-803(21)). Similarly, section 27-804(2)(d)(ii) excepts, upon showing of unavailability of the declarant, statements of family history by family members or those intimately associated with the family.

A. STATEMENT OF THE RULES:

Nebraska Revised Statutes section 27-803(10) excludes from hearsay: "Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization."²⁴⁴

Nebraska Revised Statutes section 27-803(11) excludes from hearsay:

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other

243. *Id.* at § 27-803(9).

244. *Id.* at § 27-803(10).

person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.²⁴⁵

Nebraska Revised Statutes section 27-803(12) excludes from hearsay: "Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage or other similar facts of personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like."²⁴⁶

Nebraska Revised Statutes section 27-803(17) excludes from hearsay: "Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history."²⁴⁷

Nebraska Revised Statutes section 27-803(21) excludes from hearsay: "Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation."²⁴⁸

SECTIONS 27-803(13-14, 21): RECORDED DOCUMENTS OR DEEDS:

Section 27-803(13) excepts from the hearsay rule documents recorded pursuant to the Nebraska recording statute which allegedly affect the ownership of property. Section 27-803(14) excepts from the above exception recording documents where the parties have acted inconsistently with the supposed grant. Section 27-803(21) also excepts judgments of property boundaries from the hearsay exclusionary rule.

A. STATEMENT OF THE RULES:

Nebraska Revised Statutes section 27-803(13) excludes from hearsay:

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable

245. *Id.* at § 27-803(11).

246. *Id.* at § 27-803(12).

247. *Id.* at § 27-803(17).

248. *Id.* at § 27-803(21).

statute authorized the recording of documents of that kind in that office.²⁴⁹

Nebraska Revised Statutes section 27-803(14) excludes from hearsay:

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.²⁵⁰

Nebraska Revised Statutes section 27-803(21) excludes from hearsay: "Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation."²⁵¹

SECTION 27-803(15): ANCIENT DOCUMENTS:

The ancient document exception originally was limited to authentication, but this exception extends its efficacy to permit the admissibility of statements contained therein. The qualifying period of time at common law and under the Nebraska statute is thirty years; the Federal Rule cuts the period to twenty years.

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(15) excludes from hearsay: "Statements in a document in existence thirty years or more whose authenticity is established."²⁵²

SECTION 27-803(16): MARKET REPORTS, PUBLISHED COMPILATIONS AND COMMERCIAL PUBLICATIONS:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(16) excludes from hearsay: "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations."²⁵³

B. INTERPRETIVE ANALYSIS:

This exception is important in that it allows the use of informa-

249. *Id.* at § 27-803(13).

250. *Id.* at § 27-803(14).

251. *Id.* at § 27-803(21).

252. *Id.* at § 27-803(15).

253. *Id.* at § 27-803(16).

tion relied upon by the public and or industry in day-to-day activities. Thus, for example, to prove damages, counsel may rely on the *Wall Street Journal* to prove the value of the stock on a particular day in question.

The courts on occasion admit public compilations and such, often judicially noticing their accuracy, without any discussion of the hearsay rule or the applicability of this exception; in other cases the courts exclude such testimony again without discussing the seeming applicability of this exception. For example, in *State v. Klutts*,²⁵⁴ the Supreme Court of Nebraska reversed a conviction and remanded because the prosecution had relied upon a city directory as presented by a police officer to prove residency at a particular address. Although the confrontation clause may require more under the circumstances, this exception seemingly was applicable but never discussed.

In comparison, the courts in *Rawlings v. Andersen*²⁵⁵ and *Oberhelman v. Blount*,²⁵⁶ in each instance noticed, without reference to this hearsay exception, the life expectancy tables contained in the Appendix to Volume 2A of the Revised Statutes of Nebraska. These Tables include three separate actuarial sources, Actuaries, American, and 1958 Commissioner's, each of which provide compilations regarding life expectancies. It should be noted that this same Appendix contains a present worth table which seemingly would be subject to the same analysis.

[SECTION 803(18): LEARNED TREATISES]:

The Learned Treatise exception is omitted under the Nebraska Rules, but it is a very important exception. It should be considered with the expert evidence rules, especially Rules 702-03. At common law learned treatises could only be used on cross-examination and then only if the expert relied upon it in forming his or her opinion. Under this exception any expert on direct or cross-examination can rely on a treatise if he or she admits that the treatise is relied upon by experts in the field. If accepted as reliable, learned treatises come in as substantive evidence, rather than being restricted as they were at common law for impeachment purposes.

Although Nebraska omits this exception, Nebraska has long had a little-known comparable statute. Nebraska Revised Statutes section 25-1218 provides: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or

254. 204 Neb. 616, 284 N.W.2d 415 (1979).

255. 195 Neb. 686, 240 N.W.2d 568 (1976).

256. 196 Neb. 42, 241 N.W.2d 355 (1976).

interest."²⁵⁷ This statute has been relied upon infrequently to admit scientific writings. Thus, in *Sioux City & P.R. Co. v. Finlayson*,²⁵⁸ the Nebraska Supreme Court held that books of science are competent evidence when shown to be reputable or standard works. Similarly, the court in *Van Skike v. Potter*²⁵⁹ held that text books on surgery are competent evidence as to matters of general notoriety or interest, but not otherwise. The treatises, if admissible, are not admitted into evidence as exhibits, but instead the relevant passages are read into evidence.

SECTIONS 27-803(18, 21): REPUTATION OR JUDGMENTS CONCERNING BOUNDARIES OR GENERAL HISTORY:

A. STATEMENT OF THE RULES:

Nebraska Revised Statutes section 27-803(18) excludes from hearsay: "Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputations as to events of general history important to the community or state or nation in which located."²⁶⁰

Nebraska Revised Statutes section 27-803(21) excludes from hearsay: "Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation."²⁶¹

Section 27-803(18) permits testimony of reputation as to boundaries or customs affecting lands in the community, and reputation evidence of general history important to the community or state or nation. Section 27-803(21) allows the admission of previous judgments of boundaries.

SECTION 27-803(19): REPUTATION AS TO CHARACTER:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(19) excludes from hearsay: "Reputation of a person's character among his associates or in the community."²⁶²

Under both section 27-405 (character evidence to show propensity) and section 27-608 (character evidence to show credibility or lack thereof) reputation evidence is admissible under limited circum-

257. NEB. REV. STAT. § 25-1218 (Reissue 1989).

258. 16 Neb. 578, 20 N.W. 860 (1884).

259. 53 Neb. 28, 73 N.W. 295 (1897).

260. NEB. REV. STAT. § 27-803(18) (Reissue 1989).

261. *Id.* at § 27-803(21).

262. *Id.* at § 27-803(19).

stances. To avoid a hearsay objection section 27-803(19) exists. The exception is seldom cited, perhaps because the hearsay issue is not realized, but the rule is applicable in such cases.

SECTION 27-803(20): PREVIOUS CONVICTIONS:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(20) excludes from hearsay:

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against a person other than the accused. The pendency of an appeal may be shown but does not affect admissibility.²⁶³

Previous convictions become evidentiary under section 27-609 whenever (1) a person with a previous felony conviction testifies as a witness and opposing counsel wishes to impeach him by the previous conviction, or (2) as a matter of *res judicata* or collateral estoppel when a civil case raises the same issues previously decided in a criminal proceeding. This exception eliminates the hearsay objection to such evidence.

SECTION 27-803(22); SECTION 27-804(b)(5): RESIDUAL EXCEPTIONS:

These exceptions grant the court residual discretion in admitting hearsay testimony. Presumably if the facts are close on existing hearsay exceptions and there is other indicia of reliability, the court will admit the testimony.

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-803(22) and section 27-804(b)(5) exclude from hearsay:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure

263. *Id.*

through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.²⁶⁴

B. LEGISLATIVE HISTORY:

The Nebraska Legislature adopted Federal Rule 803(24) and Federal Rule 804(b)(5), the residual exceptions. The Committee observed that previously the Nebraska courts had rigidly applied the hearsay exceptions. The Committee further noted that these "exception[s] will give the courts some latitude in expanding the area of hearsay exceptions."²⁶⁵

C. FOUNDATION:

The foundational requirements for this exception include: (i) a statement, (ii) that has circumstantial guarantees of trustworthiness, (iii) that is material, (iv) that is more probative than other available evidence, (v) the admission of which serves the interests of justice, and (vi) pretrial notice of an intent to rely on this exception has been given.

D. INTERPRETIVE DISCUSSION:

- (i) A statement has been made.
- (ii) The statement has circumstantial guarantees of trustworthiness.

The Supreme Court of Nebraska in *In re Estate of Severns*²⁶⁶ explained that the trustworthiness issue pertains to the reliability of the out-of-court declarant, not the witness who testifies and is subject to cross-examination. Accordingly, the court permitted an in-court declarant, who had a motive to fabricate his testimony, to testify to an out-of-court statement made by another regarding the ownership of a clock.

The residual exception is on occasion improperly invoked to avoid the application of the rules of evidence in special types of pro-

264. *Id.* at § 27-803(22).

265. PROPOSED NEBRASKA RULES, *supra* note 199, at 157.

266. 217 Neb. 803, 352 N.W.2d 865 (1984).

ceedings. For example, the propriety of admitting, under the residual hearsay exception, reports from therapists, social workers, and related juvenile-proceedings functionaries in a parental rights termination hearing was squarely presented in *In re Interest of J.K.B.*²⁶⁷ The court observed that while the rules of evidence are not applicable to a dispositional hearing, under Nebraska Revised Statutes section 43-283, constitutional requirements mandate that a hearing to terminate parental rights must comply with strict due process standards.²⁶⁸ Thus while the court in a termination hearing may take judicial notice of facts and opinions contained in companion juvenile court proceeding records, the facts noticed must comply with the rules of evidence.²⁶⁹ In holding that the court had improperly admitted dispositional reports from prior proceedings, the court explained the hearsay standard applied to termination hearings as follows:

We now hold that in proceedings to terminate parental rights, reports may not be received in evidence for the purpose of that proceeding, nor otherwise relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Rev. Stat. § 27-803(22) (Reissue 1985).²⁷⁰

- (iii) The statement is material.
- (iv) The statement is more probative than other available evidence.
- (v) The admission of the statement serves the interests of justice.
- (vi) The proponent has given pretrial notice of an intent to rely on this exception.
- (vii) Unavailability has been established if submitted under section 27-804(b)(5).

The Supreme Court of Nebraska in *In re Estate of Severns*²⁷¹ observed that pretrial notice is foundational to the use of the residual exception. Here notice had been given and the statement regarding the ownership of a clock was deemed admissible.

In *State v. Beam*,²⁷² the Supreme Court of Nebraska affirmed the admissibility of three hearsay statements relevant to whether the accused had shot his wife accidentally. The pretrial notice came by way of a motion *in limine*. The first statement came from an attor-

267. 226 Neb. 701, 414 N.W.2d 266 (1987).

268. *Id.* at 704, 414 N.W.2d at 268.

269. *Id.*

270. *Id.* at 705, 414 N.W.2d at 269.

271. 217 Neb. 803, 352 N.W.2d 865 (1984).

272. 206 Neb. 248, 292 N.W.2d 302 (1980).

ney who testified that the deceased had come to his office bruised and had asked him to start divorce proceedings because her husband continually beat her. The second statement came from a sheriff who testified that he had found the deceased crying in a parking lot. She had explained that she was afraid to go home because her husband would beat her. The third statement came from a co-worker of the deceased who testified that the deceased was planning on a divorce because the husband continually beat her. The court allowed all the statements in under the residual exception.

VI. SECTION 27-804: HEARSAY EXCEPTIONS WHERE THE UNAVAILABILITY OF THE DECLARANT IS FOUNDATIONAL:

SECTION 27-804(1): UNAVAILABILITY DEFINED:²⁷³

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-804(1) provides:

Unavailability as a witness includes situations in which the declarant:

(a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or

(b) Persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; or

(c) Testifies to lack of memory of the subject matter of his statement; or

(d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.²⁷⁴

273. The Rules of Civil Procedure (both state and federal) provide an additional basis for establishing unavailability for the purpose of introducing deposition testimony. Federal Rule of Civil Procedure 32 provides that a witness more than 100 miles from the trial is unavailable. FED. R. CIV. P. 32. The Nebraska Rule 32 reads:

(a) Use of Depositions. Any part or all of a deposition, so far as admissible under the Nebraska Evidence Rules applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof.

NEB. SUPREME COURT RULE 32(a) (1991).

In defining unavailability, subparagraph (3)(B) provides that a witness more than 100 miles from the hearing or beyond the subpoena power of the court is unavailable.

274. NEB. REV. STAT. § 27-804(1) (Reissue 1989).

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

B. LEGISLATIVE HISTORY:

Nebraska adopted the Federal Rule 804(a) definition of unavailability. The Committee observed that the definition follows prior Nebraska law, with the exception of expanding the definition to include a claimed lack of memory. The Committee also noted that these rules are not intended to change the use of depositions which have their own definitions of unavailability built into the rule.²⁷⁵

C. FOUNDATION:

Under section 27-804(1) there are a variety of methods available for establishing unavailability. If unavailability arises from a claim of privilege or a refusal to testify despite a court order the witness will ordinarily be required to take the stand and claim the benefits of the privilege or refuse to testify. Similarly, if the claim of unavailability is based on lack of memory, the declarant will normally have to take the stand to establish a lack of memory. In each instance the proponent of the evidence should make sure that the refusal or lack of memory is reflected in the record. If, on the other hand, the witness is physically not available then the proponent will have to furnish the court with extrinsic evidence of the witness's unavailability. If the witness is dead, then a properly authenticated death certificate will suffice. If the witness is ill an affidavit may suffice, or the court may require the testimony of a physician or other qualified witness. If the witness cannot be found or is beyond the subpoena power of the court, then a process server or other qualified witness's testimony will establish unavailability.

D. INTERPRETIVE ANALYSIS:

A valid claim of privilege clearly will suffice to establish the unavailability of the witness's testimony. For example, the court in *State v. Johnson*²⁷⁶ held that where defense counsel during the course of the trial refused to waive the spousal privilege which would bar the wife from testifying against her husband, the prosecution did not have to go through the formalities of calling the witness and hav-

275. NEBRASKA SUPREME COURT COMMITTEE ON PRACTICE & PROCEDURE, PROPOSED NEBRASKA RULES OF EVIDENCE 804, at 159-61 (1973) (hereinafter PROPOSED NEBRASKA RULES).

276. 236 Neb. 831, 464 N.W.2d 167 (1991).

ing the privilege invoked.²⁷⁷

The court in *State v. Wiley*²⁷⁸ explained that a defendant cannot take advantage of this exception by invoking the fifth amendment privilege against self-incrimination at the second trial, because the rule provides that the offering party cannot procure the unavailability of the witness.

SECTION 27-804(2):

Nebraska section 27-804(2) subjects all the 804 hearsay exceptions to the provisions of section 27-403, the residual exclusionary rule for evidence that is more unfairly prejudicial than probative. This qualification parallels the additional qualification in criminal cases of the confrontation clause.

SECTION 27-804(2)(a): FORMER TESTIMONY:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-804(2)(a) excludes from the hearsay rule:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or re-direct examination, with motive and interest similar to those of the party against whom now offered.²⁷⁹

B. LEGISLATIVE HISTORY:

Nebraska adopts Federal Rule 804(b)(1), but modifies the language in a way that does not really change the application of the rule. The Committee observed that the Rule as adopted changes the prior Nebraska law which required an identity of parties and issues.²⁸⁰

C. FOUNDATION:

Foundation for the former testimony exception, in addition to unavailability of the out-of-court declarant, includes the following: (i) a statement; (ii) at a fair adversary proceeding; (iii) involving a substantial identity of issues as the present trial; (iv) between parties with a substantial identity of interest.

277. *Id.* at 840, 464 N.W.2d at 174.

278. 223 Neb. 835, 394 N.W.2d 641 (1986).

279. NEB. REV. STAT. § 27-804(2)(a) (Reissue 1989).

280. PROPOSED NEBRASKA RULES, *supra* note 275, at 163.

D. INTERPRETIVE ANALYSIS:

- (i) An out-of-court statement was previously made.
- (ii) The statement was made in the context of a fair adversary proceeding.

Of course the key determinant factor is whether the opponent of the evidence had an opportunity and similar motive to cross-examine the witness. The courts often stress the "opportunity" to cross-examine, rather than whether the opponent actually took advantage of the opportunity to cross-examine the witness. For example, the Supreme Court of Nebraska in *State v. Neal*²⁸¹ upheld the admission of prior photo and lineup identification testimony given at a pretrial suppression hearing despite the tactical differences between cross-examining witnesses during a suppression hearing and cross-examining at trial. Because the defendant had an unrestricted opportunity to cross-examine the identification witness at the pretrial hearing, the court admitted the testimony when the witness, upon the recommendation of the psychiatrist, later refused to testify at the trial. This is another instance where everyone failed to notice that the pretrial testimony at issue, which involved prior photo and lineup identification testimony, was inadmissible hearsay under the Nebraska Rules of Evidence.

- (iii) There exists a substantial identity of parties between the two hearings.
- (iv) The opponent has a similar interest and motive to challenge the admissibility of the testimony at both the prior and present hearings.

At common law this foundational element required a substantial identity of issue between the two hearings. Under modern rules the requirement has been liberalized to require only a similarity of interest. For example, the court in *Travelers Fire Insurance Co. v. Wright*²⁸² held that a substantial identity of issues existed as between the present civil case brought by the owner for insurance benefits, and a prior criminal case successfully brought against the owner for arson. Indeed, this may have been an appropriate case for the application of *res judicata* and collateral estoppel.

The court in *Travelers Fire Insurance Co.* upheld the admissibility of the testimony against an innocent partner as well, reasoning

281. 216 Neb. 796, 346 N.W.2d 221 (1984).

282. 322 P.2d 417 (Okla. 1958).

that because the case involved partnership property the culpable partner in the prior proceeding had a sufficiently similar interest and motive in cross-examining the state's witnesses as the innocent partner would have had.

SECTION 27-804(2)(b): STATEMENT UNDER BELIEF OF IMPENDING DEATH:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-804(2)(b) excludes from the hearsay rule: "A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstance of what he believed to be his impending death."²⁸³

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 804(b)(2) as in accord with Nebraska law, but broadened it to include all criminal cases, rather than limiting it in criminal cases to homicide as the Federal Rule does.

C. FOUNDATION:

The foundation for this exception includes: (i) no subject matter limitation, as required at common law; (ii) at the time of the statement, the declarant had a sense of impending death; (iii) the statement relates to the event causing the declarant's dying condition; and (iv) the declarant has firsthand knowledge of the event described.

D. INTERPRETIVE ANALYSIS:

(i) Subject matter limitation.

At common law the dying declaration exception extended only to homicide cases. The Federal Rules extended it to civil cases as well, but retained the homicide limitation for criminal cases. The Nebraska rule does not have any subject matter limitation. However, in a non-homicide criminal case reliance on this exception may raise a confrontation issue because both *Inadi* and *Bourjaily* upheld use of hearsay exceptions against confrontation challenges only if the hearsay exception had a long-standing common-law basis. The extension of this exception to non-homicide cases does not have a long-established common-law history.

283. NEB. REV. STAT. § 27-804(2)(b) (Reissue 1989).

- (ii) At the time of the statement, the declarant had a sense of impending death.
- (iii) The statement relates to the event causing the declarant's dying condition.
- (iv) The declarant has first-hand knowledge of the event.

SECTION 27-804(2)(c): STATEMENT AGAINST INTEREST:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-804(2)(c) excludes from the hearsay rule:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.²⁸⁴

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule of Evidence 804(b)(3). The Committee observed that the Rule as adopted expands prior Nebraska law to include statements against penal as well as pecuniary or proprietary interests.²⁸⁵

C. FOUNDATION:

The foundation for declarations against interests include: (i) the declarant must subjectively believe that the statement was contrary to his or her interest; (ii) if exculpatory (a confession exculpating another accused) the statute requires corroboration; and (iii) the declarant has firsthand knowledge of the content of the statement.

D. INTERPRETIVE ANALYSIS:

- (i) The declarant must subjectively believe that the statement was contrary to his or her interest.

At common law the scope of this exception was restricted to

284. *Id.* at § 27-804(2)(c).

285. PROPOSED NEBRASKA RULES, *supra* note 275, at 166.

statements jeopardizing a pecuniary interest; the courts discounted the reliability of statements against penal interests. The modern rules extend the interest to include penal interests as well.

In any event the statement truly must be against either the financial or penal interest of the declarant. The court in *State v. Johnson*²⁸⁶ considered whether statements implicating the defendant given by the defendant's wife to the police regarding stolen property found on their property were sufficiently against her interest to qualify under this exception. In essence the prosecution argued that because her statements increased the likelihood that her husband would be incarcerated, and therefore would not be available to provide income for the family, they were against her pecuniary interest. Observing that the state offered no authority in support of an indirect pecuniary loss theory, the court held the contention without merit.²⁸⁷

In comparison, the court in *State v. Broussard*²⁸⁸ held that a statement by a drug accomplice that he had sold crack cocaine to the relatives of a resident with whom the defendant had been living qualified as a statement against the declarant's penal interest. The court held, however, that the evidence was irrelevant to the issue of whether the defendant had been merely a user and not a distributor, and upheld the exclusion of the evidence.

Mere statements of remorse offer an insufficient foundation for "against interest" characterization. For example, in *State v. Matthews*²⁸⁹ the court held that a statement by one Gary Apker to the defendant, when he was arrested for possession of illegal drugs, did not qualify as a statement against interest. The statement was "I am sorry for the trouble I've gotten you into. I wish there was something I could do for you."²⁹⁰

(ii) If exculpatory (a confession exculpating another accused) the statute requires corroboration.

The United States Supreme Court in *Lee v. Illinois*²⁹¹ implied that the confrontation clause also requires corroboration for inculpatory statements. In footnote five the Court rejected the argument that the codefendant's statement implicating the accused was admissible as a declaration against penal interest on the ground "[t]hat concept defines too large a class for meaningful Confrontation Clause

286. 236 Neb. 831, 464 N.W.2d 167 (1991).

287. *Id.* at 840, 464 N.W.2d at 174.

288. 235 Neb. 809, 457 N.W.2d 457 (1990).

289. 205 Neb. 709, 289 N.W.2d 542 (1980).

290. *Id.* at 713, 289 N.W.2d at 545.

291. 476 U.S. 530 (1985).

analysis."²⁹²

The United States Court of Appeals for the Eighth Circuit in *United States v. Rasmussen*²⁹³ outlined mandatory corroboration requirements to include consideration of: (1) whether there is an apparent motive for the declarant to misrepresent the matter; (2) the general character of the declarant; (3) whether other people heard the out-of-court statement; (4) whether the statement was made spontaneously; and (5) the timing of the declaration and the relationship between the speaker and the witness.

- (iii) The declarant's first-hand knowledge of the content of the statement.

SECTION 27-804(d): A STATEMENT CONCERNING PERSONAL OR FAMILY HISTORY:

A. STATEMENT OF THE RULE:

Nebraska Revised Statute section 27-804(d) excludes from hearsay:

- (i) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.²⁹⁴

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule of Evidence 804(b)(4) as in accord with prior Nebraska law.

SECTION 27-804(e) RESIDUAL EXCEPTION:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-804(e) provides:

A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the state-

292. *Id.* at 544.

293. 790 F.2d 55 (8th Cir. 1986).

294. NEB. REV. STAT. § 27-804(d) (Reissue 1989).

ment is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.²⁹⁵

VII. SECTION 27-805: HEARSAY WITHIN HEARSAY:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."²⁹⁶

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule 805 as in accord with prior Nebraska law.

C. INTERPRETIVE ANALYSIS:

This rule simply makes it clear that totem-pole hearsay, or hearsay piled upon hearsay, is admissible if each level of hearsay is covered by some applicable exception. The court applied this rule in *State v. Wilson*.²⁹⁷ In *Wilson* the prosecution offered into evidence a series of complaints filed with the police corroborating the testimony of the defendant's ex-wife that she had feared the defendant and had called the police numerous times for assistance against his threats. The court on appeal held that the police reports themselves were admissible as business records under section 27-803(5).²⁹⁸ The court added that the complaints contained within the reports were admissible as nonhearsay because they were not offered to prove the truth of the matter asserted, but rather to show that the complaints had been made.²⁹⁹ The reports were thus admissible under section 27-805.

295. *Id.* at § 27-804(e).

296. *Id.* at § 27-805.

297. 225 Neb. 466, 406 N.W.2d 123 (1987).

298. *Id.* at 476, 406 N.W.2d at 130.

299. *Id.* at 476, 406 N.W.2d at 129.

VIII. SECTION 27-806: IMPEACHMENT OF HEARSAY DECLARANT:

A. STATEMENT OF THE RULE:

Nebraska Revised Statutes section 27-806 reads:

When a hearsay statement or a statement defined in subdivision (4)(b)(iii), (iv), or (v) of section 27-801 has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.³⁰⁰

B. LEGISLATIVE HISTORY:

Nebraska adopted Federal Rule of Evidence 806 as in accord with prior Nebraska law.

CONCLUSION

Patterned after the Federal Rules of Evidence, the Nebraska hearsay rules further the goals of preferring in-court testimony of witnesses so that the testimonial infirmities of (1) perception, (2) memory, (3) ambiguity and (4) sincerity may be effectively probed through in-court cross-examination. Definitional limitations and hearsay exceptions, in turn, permit the introduction of certain out-of-court statements deemed sufficiently reliable to justify their admission. Working out the proper boundaries between the various inclusionary and exclusionary rules continues to challenge the practitioner in the day-to-day practice of law.

300. NEB. REV. STAT. § 27-806 (Reissue 1989).